Supreme Court, U.S.
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No. 08-432 SEP 5 - 2008

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In The
Supreme Court of the United States

BILLIE THOMPSON AND PATRICIA BROWN,

Petitioners,

vs.

GLADES COUNTY, FLORIDA BOARD OF COUNTY COMMISSIONERS, GLADES COUNTY, FLORIDA, SCHOOL BOARD, HOLLY WHIDDEN GREEN, GLADES COUNTY SUPERVISOR OF ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. §1973 and the Fourteenth Amendment of the Constitution of the United States.

2. Are crossover votes properly considered in assessing a potential vote dilution remedy under Section 2 or the Fourteenth Amendment.

3. Whether the lower court erred in holding that petitioners' proposed district – with an African American voting age population of 50.23%, or at least 47.58% if adjusted to achieve absolute population equality across districts, a Hispanic voting age population of 15.23%, and a white voting age population of approximately 33% – failed to satisfy the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986).

PARTIES TO THE PROCEEDING

All parties in the Court of Appeals are listed in the caption.

The members of respondent boards were originally named as defendants in their official capacities only but were dismissed prior to trial because their presence was unnecessary. Order of September 10, 2001, Docket Entry No. 49. They were not parties to the appeal, but for the information of this Court, the current incumbents are county commissioners Paul Beck, Russell Echols, Robert Geisler, K.S. "Butch" Jones, and Donna Storter-Long; school board members are Tom Gaskins, Patricia Pearce, Jenny Allen, Mike Pressley and Janet Storey.

CORPORATE DISCLOSURE STATEMENT

Petitioners are two individuals.

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OPINIONS BELOW

The en banc order of the United States Court of Appeals entered July 2, 2008 affirming the district court judgment by an equally divided Court is reported at 532 F.3d 1179 (11th Cir. 2008). App. 1. The panel decision of the Court of Appeals is reported at 493 F.3d 1253 (11th Cir. 2007). App. 56. That opinion was automatically vacated by the grant of en banc review; Eleventh Circuit Local Rule 35-10; 508 F.3d 975 (11th Cir. 2007). The opinion of the district court is reported at 2004 WL 5616892 (M.D.Fla.). App. 6. The order of the district court denying plaintiffs' Motion to Alter or Amend Judgment is unreported and reproduced at App. 105.

JURISDICTION

The judgment of the U.S. Court of Appeals after en banc consideration was entered on July 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 2 of the Voting Rights Act, 42 U.S.C. §1973, App. 109, and Section 1 of the Fourteenth Amendment of the Constitution of the United States. App. 111.

INTRODUCTION

This is a vote dilution case brought by two African American voters challenging at-large elections for the Board of County Commissioners and the School Board of Glades County, Florida. The issues this case presents are similar to the issue which this Court has taken for review in *Bartlett v. Strickland*, No. 07-689, "whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. §1973." Although petitioners presented an illustrative district with an African American voting age population (VAP) of 50.23%, the court below considered it to be "only an influence district," and summarily rejected petitioners' illustrative plan because it was drawn with an 8.6% countywide population deviation. Petitioners believe that decision was itself error for it applied the standard for court ordered plans to an illustrative plan, but even under the district court's holding, the illustrative district, if adjusted to achieve absolute population equality would be at least 47.58% African American in VAP.

Under the district court's formulation, this case raises the same issue as *Bartlett v. Strickland*. But in any event the record in this case persuasively demonstrates the legal fallacy in demanding a strict majority – and in the district court's view a significant majority – African American VAP in order to state a claim for vote dilution. In particular, the district court ignored the importance of crossover voting in assessing the ability to elect and ignored the sizable

Hispanic population in the remedial district, the presence of which reduced the white countywide population majority to 33% in the district and which disabled the ability of white voters to usually defeat the candidates of choice of African American voters.

These issues warrant this Court's review.

STATEMENT OF THE CASE

The district court's jurisdiction was based on 28 U.S.C. §1331 because this case presents issues arising under the Constitution and laws of the United States.

Glades County is a geographically large, sparsely populated county cornering on Lake Okeechobee, Florida (988.2 square miles, though 204 square miles are under the lake, and containing 10,576 total population). App. 15. Only two African Americans have ever run for county office in Glades County. In 1976, an African American, Charles Hall, was elected to the county commission, winning a runoff primary by nine votes. App. 18-19. Hall did not run again, and no African American ran for county office for the next 22 years. When Hall was elected, the county African American VAP percentage was 21.9%, double what it is today.[1] The second African American candidate for

[1] The 1970 census showed that the total county VAP was 2,250 with 492 (21.9%) African Americans. Docket Entry (DE) 55, ¶ 5.

(Continued on following page)

county office was plaintiff Billie Thompson. She ran for the school board in 1998, getting 41.8% of the vote in the Democratic Party primary despite the lower African American VAP of 10.12% according to the 2000 Census (834 African Americans of a total VAP of 8,239). App. 17-19; Pl. Exh. 39.

The board of county commissioners and the school board are each composed of five members. Candidates for both bodies may only run for the seat assigned to the residency district in which they reside. All are nominated and elected at-large by the voters of the entire county. Terms of office are staggered. Elections for county commission are partisan. As of January 1, 2000, elections for school board are nonpartisan. Docket Entry (DE) 41, p. 13.

Primary nomination and general election to both bodies is by plurality vote. Though at the time of the district court's decision, both boards were nominated in primaries by majority vote, DE 41, p. 13, that has since changed. In 2005 Florida ended its runoff

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The total population in 1970 was 3,369; in 1980 it was 5,992; in 1990 it was 7,591; and in 2000 it was 10,576. DE 55, Exh. D; Pl. Exh. 33, p. 3. The African American VAP percentage increased slightly between 1990 and 2000 from 9.63% to 10.12%. According to the 2000 Census, the Hispanic VAP is 12.7% and there were also 331 American Indians age 18 or older (4.0%). Pl. Exh. 33, p. 2.

primaries for both partisan and nonpartisan primaries.[2]

The Claims.

Plaintiffs contended the at-large election structures coupled with racially polarized voting diluted minority voting strength and could be remedied by adopting a plan of five single member districts in which African Americans were a majority in one of the districts for each board, or a sufficiently large minority to elect their candidate of choice with the assistance of crossover votes.[3] Plaintiffs' claims were brought under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments of the United States Constitution.[4]

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[2] All partisan primary elections in Florida, including county commission seats, were changed to plurality by Fla. Stat. §100.061; Fla. Laws ch. 2005-286, §11. The 2005 amendment did the same for nonpartisan offices which includes school boards. (However, a school board candidate who receives a majority of the primary vote will be automatically elected unless there is a write-in candidate for the general election.) Fla. Laws ch. 2005-286, §§22 and 23, amending Fla. Stat. §§105.041(1) and 105.051(1)(b).

The parties erroneously stipulated that "[e]lections for both boards are by majority vote." In fact, as the district court correctly held, the general elections are governed by plurality vote. App. 16.

[3] Complaint, DE 1, p. 5; Joint Pretrial Statement, DE 41, pp. 3, 20.

[4] After the U.S. Court of Appeals for the Eleventh Circuit decided that the Fifteenth Amendment does not encompass vote

(Continued on following page)

Under their constitutional claims, plaintiffs contended that the at-large systems for both boards were adopted with racially discriminatory purpose and continued to have racially discriminatory effects.

The Issues.

This petition involves the first *Gingles* prong.[5] The district court found plaintiffs established the second and third *Gingles* prongs, holding African American voters in Glades County were cohesive and "white voters in Glades County tend to vote as a bloc so as to usually defeat the candidate of choice of African American voters." App. 45-46. Defendants did not challenge those findings in the Court of Appeals.

Though the district court rejected petitioners' claims by holding the illustrative district did not provide African American voters an ability to elect, there was and is no factual dispute between the

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dilution claims, *Osburn v. Cox*, 369 F.3d 1283, 1288 (11th Cir. 2004), plaintiffs did not contest the dismissal of their Fifteenth Amendment claim.

[5] *Thornburg v. Gingles*, 478 U.S. 30 (1986), set out what have become known as the three *Gingles* prongs as part of establishing vote dilution under Section 2: "first, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; "[s]econd, the minority group must be able to show that it is politically cohesive"; "[t]hird, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50.

parties that the district would provide African American voters the potential to elect their candidates of choice.[6] Indeed, defendants argued to the Court of Appeals in their petition for en banc review that "[t]he effect of plaintiffs' proposed 'illustrative district' shall establish a 'safe seat'" for African American voters. Petition for Hearing En Banc, *Thompson v. Glades County*, 532 F.3d 1179 (11th Cir. 2008) (No. 05-10669-EE), pp. 13 and 3.

Defendants did assert that plaintiffs' illustrative plan did not meet the first *Gingles* prong, contending plaintiffs were "required to draw an illustrative plan with zero percent deviation in which African Americans are a majority in one of the districts." DE 41, p. 20. Plaintiffs' illustrative plan included a district with a VAP that was 50.23% African American and 15.23% Hispanic, making the white VAP approximately 33%. App. 39, 74. That district was underpopulated from the ideal by 86 persons and the plan had an overall deviation of 8.6%, or 182 persons countywide (1.7% of countywide population). App. 39-40. If 86 persons were added to the district, and all were age-eligible white citizens, the VAP of the district would be no less than 47.58% African American. White VAP would be no more than 37.3%.

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[6] *See* the joint "statement of those issues of fact which remain to be litigated." DE 41, p. 19.

The Holding of the District Court on the First *Gingles* Prong.

The district court rejected plaintiffs' illustrative district as being too narrowly African American to "translate . . . into reality" on election day. It held:

> To translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person.

App. 41. Accordingly, in the court's view the district was "only an influence district" which it believed was not encompassed by Section 2.[7] App. 40, 42. The court's analysis was a mathematical hypothesis based exclusively on the voting age percentage. As the majority opinion for the panel of the Court of Appeals described:

> [The district] court's conclusion is premised on several untenable assumptions; namely, that: (1) while not every black person would be registered and would vote, every white

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[7] The Eleventh Circuit had previously held that Section 2 did not apply to claims to merely "influence" elections. *Dillard v. Baldwin County*, 376 F.3d 1260 (11th Cir. 2004). The minority population in *Dillard* was so small and dispersed that the plaintiffs did not claim an ability to draw a district in which the minority could elect candidates of choice via a "coalition" or with crossover votes. The Eleventh Circuit expressly left open the question of whether Section 2 encompasses claims where the minority "have the ability to *elect* representatives of their choice with support from a limited but reliable white crossover vote." 376 F.3d at 1269, n.7 (emphasis in original).

> person would, in fact, be registered and would vote, and (2) all white voters would, in fact, vote for the same person and none would vote for the black minority's candidate of choice. These assumptions are not supported by any evidence in the record.

App. 73-74. Further, the panel majority noted that

> [f]or the district court to conclude that white voters would consistently defeat the black majority's candidate, the district would have to assume that a population of approximately 33% white voters would turn out in sufficient force to defeat the candidate preferred by the 50.23% of the voting population which is black. . . . [W]ithout any support, the district court's analysis assumes that a greater percentage of black voters than white voters would stay home on election day.

App. 74.[8]

The district court's assumption of 100% white bloc voting – a central premise of its ruling on the first *Gingles* prong – was inconsistent with findings for plaintiffs on the second and third prongs, specifically the amount of white crossover voting. The

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[8] Petitioners recognize the panel opinion was vacated when en banc review was granted. The opinion is quoted as a succinct statement of the assumptions of the district court and is set out because "it may be helpful . . . to the extent it is persuasive." *Oklahoma Radio Associates v. FDIC*, 3 F.3d 1436, 1444 (10th Cir. 1993), *quoting Clark Equipment Co. v. Life Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992).

findings of racially polarized voting were based on a statistical analysis of elections held in Glades County, local or statewide, in which there was an African American candidate on the ballot. There were only six such elections with analyzable data. The district court found that plaintiffs' expert witness

> Dr. [Steven P.] Cole examined the six Glades County elections discussed above and concluded that average white crossover vote was a very low 19.2%, and that white voters in Glades County tend to vote as a bloc so as to usually defeat the candidate of choice of African American voters. The Court concludes that this testimony, together with the totality of the facts and circumstances presented, satisfy the third *Gingles* prong.

App. 46. As noted, defendants did not challenge this finding on appeal. The district court also credited the expert testimony that the statistical analysis showed that "26% of the white voters voted for Thompson," App. 45, an unsurprising percentage given that Thompson received 41.8% of the vote though African Americans were only 10.12% of the VAP. Similarly, though data was not available to statistically analyze Charles Hall's nine vote margin of victory in 1976 when the county VAP was 21.9% African American, his victory is inconsistent with the district court's assumption of 100% white bloc voting against African American supported candidates.

To determine more precisely the impact Hispanic voters might have as 15.23% of the VAP in the remedial district, petitioners' expert analyzed white and Hispanic voting behavior separately in Thompson's school board race. Dr. Cole reported that African American voters and Hispanic voters voted cohesively in that contest. Pl. Exh. 36, p. 15; Pl. Exh. 37, pp. 3-4. When African American and Hispanic data were combined for analysis, the result showed they jointly supported Thompson at 74%. This was virtually identical to the 75% support for Thompson when African American data was analyzed separately. Pl. Exh. 37, pp. 3-4. None of the evidence of the ability of African American supported candidates to draw support from white voters or Hispanic voters was considered by the district court in its determination that the district was not a remedy for the existing vote dilution.

In short, the court's ruling on the first *Gingles* prong assumed there would be no white crossover while the undisputed evidence was that the average white crossover for African American candidates was not zero but 19.2%. The court effectively held that actual voting behavior did not matter in assessing the first *Gingles* prong; instead the district court proceeded on the assumption that only votes cast by African Americans mattered in the determination that the district was not a viable remedial district in the "real world." App. 41.

The district court held plaintiffs failed to demonstrate a "legally acceptable" remedy on one-person,

one-vote grounds. App. 42-43. It held plaintiffs were required to introduce a plan with *de minimis* deviations that would meet the standards for court ordered plans. ("The Court concludes that the stipulated 8.6% overall deviation . . . violates the one-person one-vote requirement of the United States Constitution." App. 43.) This holding was analytically linked to the first *Gingles* prong in that plaintiffs' illustrative district becomes less than 50% in African American VAP only if adjusted for perfect population equality.[9] Whether slightly over or under 50% of the VAP, the district court rejected the plan because it believed African Americans would be insufficiently numerous to prevail on election day.

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[9] The reapportionment data was introduced into evidence, Pl. Exhs. 33 and 34, and minor adjustments to district lines to shift some 182 persons to achieve *de minimis* deviation is a routine task at the remedial stage.

The majority panel opinion of the Court of Appeals did not view the deviation finding as dispositive for the district court's conclusion that plaintiffs failed to establish an appropriate remedy, App. 72, n.17. In dissenting, Judge Tjoflat did not address this issue, accepting for his analysis that plaintiffs had presented a majority-minority district ("The rub in this case in [*sic* is] that the district court extended the definition of an influence district beyond plaintiffs who could not form a majority-minority district to the situation at hand, where the plaintiffs have created majority, but only by a trace number of individuals."). App. 89-90.

Intent to Discriminate in Establishing Election Structures.

Plaintiffs contended that the at-large systems for both school boards and county commissions in Florida were adopted with racially discriminatory motives. Previous courts had found racial motivation in the 1947 adoption of at-large elections for school boards by state statute. *McMillan v. Escambia County*, 638 F.2d 1239 (5th Cir. 1981); *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978 (11th Cir. 1982); *Johnson v. DeSoto County Sch. Bd.*, 995 F. Supp. 1440 (M.D. Fla. 1998). Plaintiffs presented the testimony of historian Gary R. Mormino, Ph.D., that the 1947 legislation which adopted at-large primaries for school boards was adopted with racially discriminatory intent. App. 14. Dr. Mormino also testified that race was a powerful factor in the adoption of the 1900 Florida constitutional amendment which changed the election of county commissioners to at-large. *Id.*

The court found that "the 1947 enactment of the at-large school board system was for the purpose of diluting the vote of African Americans." App. 47.[10] It found the evidence "less clear . . . whether the same

[10] The district court noted that plaintiffs' expert historian had provided identical testimony regarding the racial motivation for the school board statute in the *Johnson v. DeSoto County* litigation. App. 14-15. The district court adopted the lengthy summary of Dr. Mormino's testimony contained in the *Johnson v. DeSoto County* opinion, 995 F.Supp. at 1441-52, though noting it would make its own findings of fact. App. 15, n.2.

was true with the 1900 change in the county commission system" and did not make a finding on that point. *Id.*

One of the factors identified in the Senate Report regarding the 1982 amendments to Section 2 was "whether the policy underlying the state or political subdivision's use of [a] voting qualification, prerequisite to voting, or standard, practice or procedures is tenuous." S.Rep. No. 97-417, 97th Cong. 2d Sess. 29 (1982), U.S. Code Cong. & Admin. News 1982, p. 207, quoted in *Thornburg v. Gingles*, 478 U.S. at 38. The district court concluded there was "no evidence" of any tenuous voting practices, procedures, or policies for either body. App. 53. Though a finding of intent to discriminate based on race establishes the tenuousness of a governmental policy, *City of Richmond v. United States*, 422 U.S. 358, 378 (1975), the court did not reconcile this conclusion with its express finding that the decision to adopt the voting standard at issue – at-large elections for school board -- was racially motivated, or that there was evidence, even if "less clear" of intent concerning the decision to adopt at-large elections for county commission.[11]

The district court's finding that plaintiffs had not established a viable remedy informed its decision on

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[11] In rejecting the Fourteenth Amendment claim, the court held "[t]here is no evidence of a discriminatory purpose in the enactment of policies in Glades County. . . ." App. 55-56. The claim was that the State, not the county, enacted the at-large requirements for both bodies.

the Fourteenth Amendment claims regarding the school board and county commission. It rejected those claims in a summary paragraph stating plaintiffs had failed to prove inequality of opportunity in the electoral systems. App. 54.

Appellate Proceedings.

Plaintiffs appealed contending that the district court's finding on the first *Gingles* prong was clearly erroneous and should be reversed. Plaintiffs contended that the case should be remanded for consideration of the totality of circumstances, specifically the treatment of the intent evidence, under proper legal standards for both Section 2 and the Fourteenth Amendment.

Initially, a panel of the Court of Appeals in a 2-1 decision "reverse[d] the district court's holding that the Plaintiffs' proposed remedial plan was insufficient under the first prong of the *Gingles* test and remand[ed] to the district court for reconsideration of the totality of circumstances test." App. 84.[12]

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[12] The panel majority erroneously stated that plaintiffs did not challenge the disposition of their constitutional claims, and did not address those issues. App. 66. Plaintiffs informed the appellate court they were not pursuing their Fifteenth Amendment claim, but continued to press their Fourteenth Amendment claim in their appellate brief. (Brief of Appellants, pp. 6, n.2, 32-38, *Thompson v. Glades County*, 493 F.3d 1253 (11th Cir. 2007) (No. 05-10669-EE); En Banc Brief of Appellants, pp. 10, 46,

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The full court voted to place the case en banc. The Court directed the parties to particularly brief whether the district court clearly erred in finding that the first *Gingles* prong was not met and a second issue: whether crossover voting can be considered in meeting the first *Gingles* prong. App. 3.

After briefing and en banc argument, the Court of Appeals announced that "[t]he judges of the en banc court are equally divided on the proper disposition of this case," thereby affirming the district court judgment by operation of law. App. 1-2.

REASONS FOR GRANTING THE WRIT

Plenary review is appropriate in this case for two reasons. First, it presents a similar issue of interpretation of Section 2 of the Voting Rights Act as in *Bartlett v. Strickland* (U.S. No. 07-689), which this Court has taken for review. Second, this case involves three important factual situations which should inform the interpretation of Section 2 and the first *Gingles* prong: (1) the presence of three racial groups within the county, (2) the absence of a majority vote requirement for nomination or election, and (3) the presence of racially discriminatory intent.

Thompson v. Glades County, 532 F.3d 1179 (11th Cir. 2008) (No. 05-10669-EE).

I. This Case Raises Issues Similar To The Issue Taken For Review In *Bartlett v. Strickland*.

The district court rejected plaintiffs' illustrative district as a viable remedy under the first *Gingles* prong. Regardless of whether the illustrative district is viewed as majority African American VAP at 50.23%, or just under majority-minority when adjusted for one-person, one-vote equality, the holding of the district court was that African Americans must be significantly more than a majority in an illustrative district in order to establish the first *Gingles* prong. Since this holding is similar to the issue involved in *Bartlett v. Strickland*, petitioners respectfully suggest that this Court defer consideration of this petition until the disposition of *Bartlett*.

II. The Protection Of Section 2 Should Not Be Limited By Interpreting The Statute To Include A Bright Line Majority-Minority Rule Under The First *Gingles* Prong.

Whether Section 2 applies to claims where a racial minority constitutes less than 50% of a proposed remedial district is a question of statutory construction.[13] This Court and other courts have

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[13] This Court has assumed without deciding that a district with less than a majority-minority population would satisfy the first *Gingles* prong. *Growe v. Emison*, 507 U.S. 25, 41, n.5 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993); *Johnson v.*

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recognized that racial minorities have the ability to elect candidates of their choice in some districts in which they are a minority. *E.g., Johnson v. DeGrandy*, 512 U.S. 997, 1029 (1994); *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999); *Georgia v. Ashcroft*, 539 U.S. 461, 480-81 (2003). Because the statute expressly protects the ability "to elect" the issue is: as a matter of law does Section 2 exclude some claims where a districting remedy providing the ability to elect is in fact available?

The numerosity requirement of the first *Gingles* prong speaks to both violation and remedy: is the minority population large enough to be negatively affected by majority bloc voting in the at-large or multi-member structure, and would the minority possess the ability to elect if placed in a single member district. It is noteworthy that the second and third *Gingles* prongs – cohesion by the minority and bloc voting by the majority – though developed through court decisions were recognized in Senate Factor 2: "the extent to which voting in the elections of the state or political subdivision is racially polarized." S.Rep. No. 97-417, 97th Cong. 2d Sess. 28-29 (1982), U.S. Code Cong. & Admin. News 1982, pp. 206-207 (quoted in *Thornburg v. Gingles*, 478 U.S. at 37). But the first prong is entirely Court created. Combined, the three prongs explain how Section 2

DeGrandy, 512 U.S. 997, 1008-09 (1994); *LULAC v. Perry*, 548 U.S. 399, 443 (2006).

works. Both violation and remedy depend on the interplay between the size of the minority, its cohesion and the level of majority bloc voting. Any of the three can vary, a reality inconsistent with fixing one of the three with a mathematical limit for all cases. The first *Gingles* prong can be applied whether or not a majority-minority district is available. A 50% rule is not necessary to make the analysis work. If the potential remedy is effective, then applying a 50% requirement for VAP to exclude the claim is a redundancy inconsistent with Section 2. If the remedy can prevent vote dilution, whether it does so by a district that is higher or lower than 50% in minority VAP should have no bearing on whether Section 2 applies.

A 50% bright line requirement for the first *Gingles* prong is also problematic because it is an inexact proxy for the size of a voting population needed to successfully elect. Voting age population, even citizenship voting age population, is several steps removed from voting. Elections are determined by who actually votes. Turnout is always less than total registration; registration is less than VAP. Both can vary among racial groups. Numerous factors distance the outcome from the VAP statistic. *Burns v. Richardson*, 384 U.S. 73, 92-93 (1966) (registration and turnout fluctuates with issues, candidates "or even weather conditions"). A hard and fast 50% VAP cutoff for remedial districts for all Section 2 claims is unwarranted because it does not require 50% of the voting age population to win an election.

Section 2 applies nationwide to a variety of election structures. Most states, including Florida, do not have majority vote requirements for nomination or election. In contrast, North Carolina had a majority vote requirement for primaries when *Gingles* was decided. 478 U.S. at 39. To the extent that the first *Gingles* prong is part of assessing the ability to elect as an alternative to at-large or multi-member voting, it should not be set at 50% for all Section 2 claims because that is higher than what is needed to prevail in elections in most jurisdictions.

A. Section 2 Is Designed To Reduce Voting Along Racial Lines. The Equal Opportunity To Elect Protected By Section 2 Should Not Be Limited To Situations Where The Plaintiff Minority Group Can Elect Only With Votes From Their Own Race.

The holding below expanded the first *Gingles* prong to mean that the minority group had to show it could win elections based solely on votes from African Americans: "[t]o translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person." App. 41. A necessary premise of this interpretation is that crossover voting is irrelevant in assessing a remedy for existing vote dilution. Such interpretation has two flaws: it prevents the practical evaluation of a remedy and undercuts the statutory goal of encouraging crossover, that is, non-racially polarized voting and the lessening of

racism in American politics. *Johnson v. DeGrandy*, 512 U.S. at 1020.

The fundamental reason crossover votes are properly considered in meeting the first *Gingles* prong is that it is impractical to determine the effect of an election structure if we act as if those votes do not exist. Crossover votes go somewhere. They do not disappear. To exclude those votes from the assessment of the remedy is to pretend that those votes will not be cast. In situations where crossover votes would make a difference (candidate A wins if the crossover votes are counted; candidate B wins if the crossover votes are excluded), it is impossible to do an accurate analysis of the viability of a district if those votes are disregarded. Excluding relevant votes means a different – entirely hypothetical – system is being analyzed; it is not the "searching practical evaluation" required by Section 2. *Thornburg v. Gingles*, 478 U.S. at 75, *quoting* Senate Report, at 30, U.S. Code Cong. & Admin. News, p. 208.

Crossover votes are relevant at every step of the vote dilution analysis. High levels of white bloc voting and minority cohesion can help establish a violation. Conversely, high levels of crossover voting may defeat a finding of a violation. *Thornburg v. Gingles*, 478 U.S. at 56. Crossover votes, correctly seen as being beneficial to minority voters, are not properly dropped from the analysis at the point where they help minority voters establish a remedy.

In applying Section 2, this Court has said "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *Johnson v. DeGrandy*, 512 U.S. at 1020. The court below determined that white bloc voting was frustrating the ability of African American voters to elect their candidates. If needed for a remedy, Section 2 protects minority supported candidates' opportunity to seek votes across racial lines. Requiring remedial districts to have minority percentages so high as to hypothesize that minority supported candidates might be able to win with no crossover votes is antithetical to Section 2. That would encourage unlawful packing of minority voters, and is problematic for that reason alone. *Georgia v. Ashcroft*, 539 U.S. at 481.

B. The Presence Of Three Racial Groups In Glades County Demonstrates How Remedial Districts Can Work Regardless Of Whether The Plaintiff Minority Group Is A Majority In The District.

This record demonstrates that an effective remedial district does not require a majority-minority of the plaintiff racial group. Districting remedies for vote dilution work by disabling the majority group's ability to control all seats. Within the remedial district here, the white county wide majority is reduced to 33% and would no longer be automatically able to

"usually defeat" the choice of African American voters. That is the protection Section 2 was structured to provide. A 50% VAP bright line cut off for claims could exclude meritorious claims brought where there are more than two racial groups in a jurisdiction.

The presence of the 15.23% Hispanic VAP demonstrates a flaw in the district court's interpretation of the first *Gingles* prong. The district court hypothesized that white voters could, if only as a mathematical possibility, frustrate the remedy and defeat African American supported candidates. At 33% (white) vs. 50.23% (African American), that could only be true if the white supported candidates garnered crossover or coalitional votes from African Americans, Hispanics or others. In short, the possibility of whites garnering crossover votes was credited; the potential for African American supported candidates to seek votes across racial lines was not. This disparate standard denied African Americans in Glades County the equal right to pull, haul and trade for votes across racial lines.

The district court's interpretation of Section 2 is problematic for the additional reasons that its assumptions about voting behavior were (a) contrary to the record of existing crossover levels by African Americans, whites and Hispanics, (b) contrary to the requirement that voting behavior be proved, *Thornburg v. Gingles*, 478 U.S. at 46, and (c) assumed that African Americans would be outperformed by whites and others.

C. The Decision Below Incorrectly Expanded The First Gingles Prong To Require A Guarantee Of Electoral Success.

This Court has held that "the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success . . . " *Johnson v. DeGrandy*, 512 U.S. at 1014, n.11; *LULAC v. Perry*, 548 U.S. at 443. By rejecting the remedy as not realistic though African Americans would be roughly half the VAP, the court below applied the first *Gingles* prong to require a guarantee of success. The holding that every African American would have to register, turn out, and vote for the same candidate in order to make the remedy a reality meant that petitioners had to show that African American voters would likely prevail in an election no matter what efforts were made by other voters. African Americans would have to be a substantial majority of the VAP, not just a majority, to satisfy the district court's standard. The ruling both expanded the requirement of the first *Gingles* prong and is contrary to the promise of Section 2, the protection of equality of opportunity, not the guarantee of electoral success.

D. Positions Taken By The Solicitor General.

Across administrations of both political parties, the United States has supported plaintiffs where illustrative districts of less than 50% were involved. Brief for the United States as Amicus Curiae, *LULAC v. Perry*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439), 2006 WL 271820 (U.S.). The United

States has argued that though Section 2 does not require the creation of districts in which minorities are less than a majority by a substantial margin, plaintiffs who present a district in which the minority was slightly less than 50% may have a viable claim.[14] The Solicitor General argued that "the requirement that the minority group may be sufficiently numerous and compact to constitute a majority of a single-member district may be relaxed where intentional racial discrimination has been shown." Brief for United States as Amicus Curiae, *Growe v. Emison*, 507 U.S. 25 (1993) (No. 91-1420), Br. at 12 n.6 (citing *Garza v. County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990)). The Solicitor General also noted that "the government has argued that a flat 50% rule was inappropriate when the minority group was compact, politically cohesive, and substantial in size yet just short of a majority." Brief for the United States as Amicus Curiae, 2006 WL 271820 (U.S.) (internal citations omitted). As the United States explained in the brief it submitted in *Bartlett v. Strickland*:

> While it correctly recognized the majority-minority requirement, the North Carolina Supreme Court went further than necessary in this case by stating that the requirement is absolute. The United States has previously

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[14] The Solicitor General opposed the African American claim in *LULAC v. Perry* arguing that permitting Section 2 claims when the minority group is *substantially* less than a majority of the voters in an alternative district raised various concerns. *Id.* at 20-21.

> explained that the general majority-minority requirement may be relaxed in two situations. The first is where a plaintiff shows that a challenged voting practice was adopted with discriminatory intent. Such a showing tends to suggest that a jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice. There is no allegation in this case of such an intent. The second is where the minority group is substantial in size yet just short of a majority. That adjustment accounts for the fact that census data may be imprecise and that population is a fluid, not static, concept. The minority group at issue here – at 39.36% of the voting-age population – constitutes far less than a majority in the proposed district. To decide this case, therefore, it was not necessary for the North Carolina Supreme Court to state that a numerical majority is *always* required.

Brief for United States as Amicus Curiae, *Bartlett v. Strickland*, ___ U.S. ___ (2008) (No. 07-689), Br. at 6 (emphasis original); *see also id.* at 13-17. Petitioners in the case at bar fit squarely within both of these exceptions.

As to the first exception, the district court found that the 1947 enactment of the at-large school board statute was for the purpose of diluting the African American vote. App. 47. This finding is in line with a series of cases finding racially discriminatory motivation for enactment of this statute. *Supra*, p. 13. Additionally, because the court below found some

evidence showing racial intent regarding the adoption of at-large elections for the county commission but did not resolve the question, the claim regarding the county commission should be remanded to decide the issue of intent.

As to the second exception, the United States has supported districts with percentages of minority VAP similar to petitioners' illustrative remedial district. In *Valdespino v. Alamo Heights Independent Sch. District* (U.S. No. 98-1987), for example, the minority group represented 48% of the citizen voting-age population. The United States filed a brief as amicus curiae at the certiorari stage, repeatedly referring to the fact that the minority group was "just short of a majority." U.S. Br. at 11, *Valdespino*, *supra*; *see id.* at 10 (noting that the minority population was "slightly less than 50%"). Similarly, in *Perez v. Pasadena Independent Sch. District* (U.S. No. 98-1747), the United States filed an amicus brief reiterating the position it took in *Valdespino*. *See* U.S. Br. at 7-8, *Perez*, *supra*. If petitioners' illustrative plan here were adjusted to ideal population, the black voting age population would be no less than 47.58%, indistinguishable from 48% that the United States supported in *Valdespino*.

For all of the above reasons, the district court's interpretation of Section 2 warrants this Court's review.

III. The Fourteenth Amendment Protects Against Vote Dilution Without Requiring That A Remedial District Be Majority-Minority.

Intent to discriminate is required in order to establish a Fourteenth Amendment claim of vote dilution. *City of Mobile v. Bolden*, 446 U.S. 55, 68-69 (1980). The effect of that discrimination can be demonstrated even if the only effective remedy were a 49% or less minority district which depended on crossover votes. To illustrate, consider a jurisdiction with an existing district in which the racial minority is 49% of the VAP and that is the highest percentage possible. A minority supported candidate has been able to win in that district by gathering a modest number of white crossover votes. Based on that information, the governing body decides to reduce the minority population of the district to enable the white bloc vote to prevail. Under the Fourteenth Amendment, the presence of discriminatory intent and effect are present, and the remedy would be to put or keep in place a 49% minority district.

As set forth above, plaintiffs' illustrative district provided a viable remedy; the district court found "the 1947 enactment of the at-large school board system was for the purpose of diluting the vote of African Americans." App. 47. The district failed to make a definitive finding on plaintiffs' evidence of intent regarding the county commission, reciting only that the evidence was "less clear" regarding the at-large elections for the county commission.

In the presence of evidence of intent to discriminate and the findings of polarized voting, the disposition of the Fourteenth Amendment claims merits plenary review.

CONCLUSION

Petitioners respectfully suggest that consideration of this petition for certiorari should be deferred pending the disposition of *Bartlett v. Strickland*, No. 07-689. Alternatively, the petition should be granted for the reasons stated above.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-10669

D.C. Docket No. 00-00212 CV-FTM-29-DNF

BILLIE THOMPSON,
PATRICIA BROWN,

Plaintiffs-Appellants,

versus

GLADES COUNTY BOARD OF
COUNTY COMMISSIONERS,
GLADES COUNTY SCHOOL BOARD,
HOLLY WHIDDEN GREEN, Glades
County Supervisor of Elections,

Defendants-Appellees,

ROBERT GIESLER, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(July 2, 2008)

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

The judges of the en banc court are equally divided on the proper disposition of this case. Therefore, the judgment of the district court is AFFIRMED by operation of law.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

[Name Omitted In Printing]

January 3, 2008

TO ALL COUNSEL OF RECORD

Re: No. 05-10669 – Billie Thompson, et al. v. Glades County Board of Commissioners, et al.

Dear Counsel:

For the purposes of the upcoming en banc rehearing in the above-referenced case, the court desires for counsel to focus their briefs on the following issues

1. **Whether the district court clearly erred in finding the first prong of the *Gingles* test (that a minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district") was not satisfied by the proposed plan in this case.**

2. **Can crossover voting be considered in meeting the first prong of the *Gingles* test and, if so, (a) was an argument raised before the district court regarding white crossover voting as a basis for satisfying the first prong, and (b) was sufficient evidence presented in this regard? (Brief the entire question.)**

Appellant's en banc brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Monday, February 4, 2008. Appellee's en banc brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Wednesday, March 5, 2008. Any en banc reply brief by the Appellant must be filed in the Clerk's Office in Atlanta by 5:00 p.m., Wednesday, March 19, 2008. NO EXTENSIONS WILL BE GRANTED. An original and 18 copies of the en banc briefs should be filed (appellant's in blue covers, appellee's in red covers and any reply in gray covers). The parties are expected to insure that all other parties receive a copy of their briefs before the close of business on the day of filing (facsimile, e-mail, etc.). NO TIME FOR MAILING SHALL BE ALLOWED. The filing of an en banc amicus briefs is governed by 11th Cir. R. 35-8. All parties are also required to upload the brief in electronic format to the court's Web site as described in 11th Cir. R. 31-5.

All counsel are requested to file 16 copies of their original opening panel briefs, record excerpts and supplemental authorities prior to 5:00 p.m., Monday, February 4, 2008.

Oral argument will be conducted during the week of June 16, 2008, in Atlanta, Georgia. Each party will be allotted 20 minutes per side for oral argument. Counsel will receive subsequent correspondence regarding the specific date and time of oral argument.

Thank you for your attention.

Sincerely,

THOMAS K. KAHN, Clerk

By: _____

Matt Davidson
Calendar Clerk/
Court Sessions Supervisor
404.335.6131

Neil Bradley 404.653.0331
Gavin W. O'Brien

2004 WL 5616892

United States District Court, M.D. Florida,
Fort Myers Division.
Billie THOMPSON and Patricia Brown, Plaintiffs,
v.
GLADES COUNTY BOARD OF COUNTY COMMISSIONERS, Glades County School Board, and Holly Whidden Green, in her official capacity as Glades County Supervisor of Elections, Defendants.
No. 2:00-cv-212-FTM-29DNF.

Aug. 27, 2004.

Cathy L. Lucrezi, Law Office of Cathy L. Lucrezi, Ft. Myers, FL, Bryan Sells, ACLU Foundation, Inc., Atlanta, GA, Laughlin McDonald, Cristina M. Correia, Neil Bradley, Bryan Sells, for Plaintiffs.

Gavin W. O'Brien, Gavin W. O'Brien, P.A., Bradenton, FL, for Defendants.

OPINION AND ORDER

JOHN E. STEELE, District Judge.

Plaintiffs, two African-American citizens and registered voters of Glades County, Florida, challenge the current at-large method of electing the Glades County Board of County Commission (the County Commission) and the Glades County School Board (the School Board). Plaintiffs assert that the at-large systems were adopted by the State of Florida with a racially discriminatory intent, and have racially

discriminatory effects when coupled with the staggered terms, majority vote, residential district requirements, and racially polarized voting in Glades County. This results, plaintiffs assert, in an unlawful dilution of African-American voting strength in violation of section 2 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments of the United States Constitution. Plaintiffs seek an injunctive order dividing the county into five single-member districts, each of which would elect one member to the County Commission and one member to the School Board. One of these single-member districts, plaintiffs assert, would have an African-American majority voting age population.

The Court conducted a bench trial, received a variety of stipulated exhibits, and took judicial notice of a number of items. Nine depositions were subsequently filed, which the Court has read, and the Court then heard closing arguments. At the Court's request, counsel also filed the current Glades County district maps for the School Board and the County Commission.

I. Legal Principles

A. Voting Rights Act

The Voting Rights Act was "designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479, 117 S.Ct. 1491, 137 L.Ed.2d

730 (1997), and "prohibits all forms of voting discrimination." *Thornburg v. Gingles,* 478 U.S. 30, 45 n. 10, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Section 2 of the Voting Rights Act of 1965, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set fort in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. Thus, Section 2 prohibits "any practice or procedure that, interact[ing] with social and historical conditions, impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter,* 507 U.S. 146, 153, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (citing *Thornburg v. Gingles,* 478 U.S. at 47). A 1982 amendment clarified that a plaintiff may establish a violation of Section 2 by showing discriminatory results alone, even in the absence of discriminatory intent. 42 U.S.C. § 1973(b); *Burton v. City of Belle Glade,* 178 F.3d 1175, 1196 (11th Cir.1999); *Johnson v. DeSoto County,* 72 F.3d 1556, 1561-62 (11th Cir.1996). The reverse, however, is not true. A discriminatory intent alone is not sufficient, and there must be a showing of discriminatory effect. *Brooks v. Miller,* 158 F.3d 1230, 1237 (11th Cir.1998); *Johnson,* 72 F.3d at 1561.

Vote dilution is a form of voting discrimination prohibited by Section 2, and "occurs when an election practice results in the dilution of minority voting strength and, thus, impairs a minority's ability to elect the representative of its choice." *Burton v. City of Belle Glade,* 178 F.3d at 1198. To prevail on a claim of vote dilution under Section 2, plaintiffs must first prove the three threshold *Gingles* preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that the minority group is "politically cohesive;" and (3) that the white majority usually votes sufficiently as a block to enable it to

usually defeat the minority's preferred candidate. *Thornburg v. Gingles,* 478 U.S. at 50-51; *Abrams v. Johnson,* 521 U.S. 74, 91, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); *Johnson v. Hamrick,* 296 F.3d 1065, 1072-73 (11th Cir.2002) (*Hamrick III*); *Solomon v. Liberty County Comm'rs,* 221 F.3d 1218, 1225 (11th Cir.2000) (en banc) (*Solomon IV*); *SCLC v. Sessions,* 56 F.3d 1281, 1289-90 (11th Cir.1995) (en banc). Establishing these three preconditions is necessary, but not sufficient, to prevail on a Section 2 claim. *Johnson v. De Grandy,* 512 U.S. 997, 1012-13, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Hamrick III,* 296 F.3d at 1073; *Burton v. City of Belle Glade,* 178 F.3d at 1198-99. Plaintiffs must also show that, under the totality of the circumstances, the challenged electoral scheme had the effect of depriving them of "an equal measure of political and electoral opportunity" to participate in the political process and to elect representatives of their choosing. *Abrams,* 521 U.S. at 91; *Johnson v. De Grandy,* 512 U.S. at 1013; *Hamrick III,* 296 F.3d at 1073; *Burton v. City of Belle Glade,* 178 F.3d at 1199. In other words, plaintiff must establish that the system had discriminatory results. *Voinovich v. Quilter,* 507 U.S. at 155. To aid courts in evaluating the totality of the circumstances, *Gingles* identified a non-exhaustive list of other factors, derived from the Senate Report accompanying the 1982 amendment to Section 2, that should be considered.[1]

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[1] Those factors include: (1) The extent of any history of official discrimination in the state or political subdivision that

(Continued on following page)

While multimember districts and at-large voting schemes may violate Section 2 because they result in vote dilution, they are not *per se* unlawful. *Gingles,* 478 U.S. at 48; *Hamrick III,* 296 F.3d at 1072. "[T]o be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause." *Solomon IV,* 221 F.3d at

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touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) The extent to which voting in the elections of the state or political subdivision is racially polarized; (3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) If there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) Whether political campaigns have been characterized by overt or subtle racial appeals; (7) The extent to which members of the minority group have been elected to public office in the jurisdiction; (8) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (9) Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *Solomon IV,* 221 F.3d at 1225-26. Courts should also consider the number of majority-minority voting districts and minority members' share of the relevant population. *Hamrick III,* 296 F.3d at 1073 n. 1.

1225 (quoting *Nipper v. Smith,* 39 F.3d 1494, 1515 (11th Cir.1994) (en banc) (Tjoflat, C.J., plurality opinion).

"No single statistic provides courts with a shortcut to determine whether a set of [electoral structures] unlawfully dilutes minority voting strength." *Johnson v. De Grandy,* 512 U.S. at 1020-21. The finding of vote dilution is a question of fact which requires a searching, practical evaluation of all relevant evidence of the past and present reality of the challenged electoral system in operation and its interaction with social and historical conditions. *Solomon IV,* 221 F.3d at 1226 n. 7; *Wilson v. Minor,* 220 F.3d 1297, 1307 n. 13 (11th Cir.2000). The ultimate question is whether the present electoral systems in Glades County, interacting with social and historical conditions, cause an inequality in the opportunities enjoyed by African-American voters to elect their preferred representatives. *Gingles,* 478 U.S. at 47. In arriving at the answer to this question, the Court is required to explain with particularity its reasoning and the subsidiary factual conclusions underlying that reasoning. *Solomon IV,* 221 F.3d at 1227-28.

B. Fourteenth and Fifteenth Amendments:

The Equal Protection Clause of the Fourteenth Amendment prohibits any State from "deny[ing] to any person within its jurisdiction the equal protection

of the laws." U.S. Const. amend. XIV, § 1. Initially, the Eleventh Circuit stated that "[w]hether vote dilution is cognizable at all under the Fourteenth and Fifteenth Amendments is uncertain. *See Burton v. City of Belle* 178 F.3d 1175, 1187 n. 9 (11th Cir.1999)." *Johnson v. County Bd. of Comm.*, 204 F.3d 1335, 1344 n. 17 (11th Cir.2000). *See also Voinovich v. Quilter,* 507 U.S. at 159; *Rogers v. Lodge,* 458 U.S. 613, 619 n. 6, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982). More recently, however, the Eleventh Circuit stated in the context of the Fourteenth Amendment that "[e]lectoral schemes which cancel out or dilute the voting strength of racial groups are unconstitutional when they are adopted with a discriminatory purpose. In order to state a racial vote dilution claim under the Constitution, intent to racially discriminate must be shown." *Clark v. Putnam County,* 293 F.3d 1261, 1266 (11th Cir.2002) (citations omitted). To establish a constitutional vote dilution claim under the Fourteenth Amendment, Plaintiffs must show that: (1) the county's black population lacks an equal opportunity to participate in the political process and elect candidates of its choice; (2) this inequality of opportunity results from the county's election scheme; and (3) a racially discriminatory purpose underlies the enactment or operation of the county's election scheme. *Johnson v. DeSoto County Bd. of Comm.,* 204 F.3d at 1345; *NAACP v. Gadsden County Sch. Bd.,* 691 F.2d 978, 981 (11th Cir.1982). In other words, plaintiffs must establish the lack of equal opportunity, causation, and discriminatory intent.

The Fifteenth Amendment guarantees that no citizen's right to register and to vote shall "be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const., Amend. 15. The Eleventh Circuit has recently held that there is no cognizable claim for vote dilution under the Fifteenth Amendment. *Osburn v. Cox,* 369 F.3d 1283, 1288 (11th Cir.2004).

II. Factual Overview

A. Florida History of Racial Discrimination

Dr. Gary R. Mormino (Dr. Mormino) is a history professor who testified as plaintiffs' expert in the racial history of Florida. Dr. Mormino was asked to research "the changes of electing or appointing school boards and county commissioners in Florida from the 19th Century to the mid-20th century, with particular attention to the use of at-large and single member districts. . . . [and] the circumstances surrounding the adoption of these provisions and to determine what role racial motivation played, if any, in the adoption of election structures." (Plaintiffs' Exhibit 2, p. 3). Dr. Mormino's testimony and his Declaration (Plaintiffs' Exhibit 2) concerning the relevant Florida history was drawn from research he performed in connection with *Johnson v. DeSoto County Sch. Bd.*, 995 F.Supp. 1440 (M.D.Fla.1998). Dr. Mormino's Declaration and testimony in the current case is identical to that given in *Johnson,* with the exception of information

in *Johnson* relating specifically to DeSoto County. The Court therefore adopts the *Johnson* summary of Dr. Mormino's evidence.[2] 995 F.Supp. at 1443-49.

Dr. Mormino opined "that the 1947 legislation which adopted, for the first time since 1907, statewide at-large school board primaries was adopted with racially discriminatory intent. Further, the constitutional amendment adopted in 1900 making county commissioners elected for the first time since 1868 would not have been proposed if blacks had not been largely eliminated from the electorate." (Plaintiffs' Exhibit 2, p. 24). Dr. Mormino testified that race was a powerful factor in the 1900 Florida constitutional amendment which changed the election of county commissioners to at-large. (Doc. # 56, pp. 67-68).

B. Glades County, Florida:

Glades County became a Florida county in 1921, and was previously a portion of DeSoto County. Glades County consists of approximately 988.2 square miles in southwest Florida, although approximately 204 square miles of the county consists of a portion of Lake Okeechobee. Glades County is

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[2] While the Court adopts the *Johnson* summary of Dr. Mormino's evidence because it is an accurate summary of his testimony and Declaration in this case, the Court does not adopt the *Johnson* factual findings. The Court will reach its own factual determinations based upon the totality of the evidence presented in this case.

sparsely populated (averaging 13.5 people per square mile); the City of Moore Haven is its largest and only incorporated city, and is the county seat.

Both the County Commission and the School Board in Glades County utilize multi-member districts, a residency requirement, and at-large voting schemes. Both the County Commission and the School Board consist of five members who serve staggered four-year terms. Fla. Const. Art. VIII, § 1(e) (county commission); Fla. Stat. § 100.041(3) (1987) (school board). The county is divided into five residential districts; candidates for the commission and the school board must run from the district in which they live, although all voters in the county vote for all members. Fla. Const. Art. VIII, § 1(e) (commission); Fla. Stat. § 124.01 (1987) (commission); Fla. Stat. § 1001.36-361 (school board). In both the party primary and general elections, the entire county electorate votes for one candidate from each district. Fla. Stat. § 100.041(2) (commission); Fla. Stat. § 1001.36 (school board). A candidate must receive a majority of the countywide vote in the primary to be selected as his or her political party's nominee in the general election. If no candidate receives a majority of the vote in the party primary, a run-off primary election is held. *See* Fla. Stat. §§ 100.061, 100.091. In the general election, candidates must obtain a plurality of the countywide vote to win election. Fla. Stat. §§ 100.181, 1001.361. Because most candidates in Glades County are Democrats, voters usually decide races during the party primary elections. The County

Commission elections are partisan; the School Board elections were partisan until January 1, 2000, when the School Board elections became non-partisan by virtue of a change in a Florida statute.

The 2000 Census reflected the following information for Glades County:

2000 Population

Race	Number	Percentage of Total
Hispanic	1,594	15.02%
African American	1,113	10.52%
American Indian	533	5.04%
Non-minority	7,366	69.36%
Total	10,576	100%

2000 Total Voting Age Population

Race	Number	Percentage of Total
African American	834	10.12%
American Indian	331	4.02%
Non-minority	6,029	73.18%
Total	8,239	100%

The African American population in Glades County is concentrated in and around the City of Moore Haven, particularly an area referred to as Washington Park. According to the 2000 Census, the voting age population of Moore Haven is 1,115, with 210 (18.8%) being African American. The Glades

County public schools were desegregated in 1969 after the threat of losing federal aid.

Economic data from the 1990 Census[3] reveals that 32.8% of African Americans (300 people) in Glades County lived below the poverty line, while 10% of Caucasians (586 people) were in the same category; that per capita income for African Americans in Glades County was $6,130, compared with $12,012 for Caucasians; that the unemployment rate for African Americans was 13.6%, compared with 5.5% for Caucasians; that 79% of African Americans over 25 years of age had not finished high school, while 39.9% of similarly aged Caucasians had not done so; that about 45% of African-American households live in owner-occupied dwellings, compared with 81% of Caucasian households; and that 22.9% of African-American households are without access to vehicles, compared to 4.5% of Caucasian households. African Americans employed by the defendants tend to be at lower pay ranges and disproportionately represented in the service and maintenance areas.

In its history, only one African American has sought election to the Glades County Commission. Charles Hall was elected to the Glades County Commission in 1976, winning a run-off primary election

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[3] The 2000 Census figures were not available at the time of plaintiffs' expert's report, but there is a rebuttable presumption that census figures are continually accurate. *Johnson v. DeSoto County Bd. of Comm.*, 204 F.3d 1335, 1341 (11th Cir.2000). Nothing suggests that the 2000 Census figures are significantly different.

by nine votes. He served a four year term and did not seek re-election. In its history, only one African American has sought election to the School Board. Plaintiff Billie Thompson ran unsuccessfully for the Glades School Board in 1998. In its history, only one African American has sought election to City Council for the City of Moore Haven. Beamon Rich was elected in September, 1998, placing third in a seven candidate race with 16.2% of the votes. Under the City's election structure, voters cast up to three votes for different candidates and the top three vote-getters are elected.

On June 5, 2001, there was a non-binding special referendum in Glades County as a result of the current litigation. The first question presented was: Shall the five members of the Board of Commissioners of Glades County, Florida be elected to office from single-member districts by the electors residing in each of those districts only? This was defeated by a vote of 719 in favor and 825 opposed. Plaintiffs' expert Dr. Steven Cole estimated that approximately half of the African American and half of the white voters supported the referendum, and that this was not a racially polarized issue. The second issue was: Shall the five members of the School Board of Glades County, Florida be elected to office from single-member districts by electors residing in each of those districts only? This was defeated by a vote of 698 in favor and 848 opposed. Dr. Cole estimated that 45% of African American voters voted in favor of the referendum, while 47% of white voters supported the

referendum, and that this was not a racially polarized issue.

Neither defendant is under any court order regarding desegregation or affirmative action. There was no evidence of other lawsuits claiming racial discrimination.

C. Recent Glades County Elections

(1) School Board Officials:

Janet Storey (Storey) testified by deposition that she was the School Board member from District 1. Except for a four year period when she lived in Texas after marrying a Texan, Storey has lived in Glades County her entire life. She went to school in Glades County, graduating from high school in 1969. She recalled that school desegregation started with Seminole Indians who attended her school while she was in grade school; later, the black community started desegregation in a gradual process. She felt there were no problems associated with desegregation, and that any problems were just kids being kids. The county closed Washington Park school, and the black students and teachers went to other Glades County schools. She remembered that some of the black students preferred their own school and did not like the adjustment to new schools.

Storey retired in 1997 after 22 years as a school teacher in Glades County; her husband is a rancher in Glades County. Storey and her husband belong to

the Cattleman's Association and the Glades County Youth Livestock; there are black members of the latter group, but probably not in the first organization because it is a small organization.

Storey had several relatives run for public office: Her father, William H. Peeples, was on the Glades County Commission for sixteen years in the late 1950s and 1960s; her uncle, Joe Peeples, was on the Glades County Commission in the 1970s for one or two terms; and her first cousin, Jimmy Peeples, ran for the Glades County Commission in the early 1990s but lost. Storey has no relatives employed by Glades County or the Glades County School Board.

At the encouragement of others (school teachers and acquaintances), Storey ran for a seat on the Glades County School Board in November, 1998. The incumbent Turney Pearce decided not to seek re-election, and Storey ran unopposed. At the time there was a lawsuit by a teacher who was not rehired by the School Board which created dissension in the county, and Storey felt the matter had gone on long enough and should be resolved. This lawsuit did not involve any racial issues. Her campaign was largely self-financed; she spent approximately $500, and received one contribution from her cousin. She put up signs and attended community association meetings.

Storey had no position on whether there should be at-large or single-member districts, and was willing to accept the decision of the 2001 referendum. The 2001 referendum was reported in newspaper

articles, but she did not discuss the issue with others because she did not want to influence their decision.

Catherine Baxter Peeples (Peeples) testified by deposition that she was the School Board member from District 2. Peeples was elected in November, 2000, winning the election over incumbent Kathy Browning on her first run for public office.

Peeples was born in Glades County and lived there until 1971. She was in grade school when the schools were desegregated; her mother is part American Indian, and Peeples was raised on a reservation part of the time. While Peeples did not personally have any problems during desegregation, she remembered a violent incident with older children which was dealt with successfully. After desegregation started, more and more children came from the Washington Park area.

Peeples returned to Glades County in 1989, and taught school from August, 1989 until January, 1998, when she left to write a grant for a domestic violence victim advocacy program for the Sheriff's Office. She later became the domestic violence advocate for the Sheriff's Office. Her husband is a cattle rancher. She had no relatives employed by the School Board or by Glades County; her brother-in-law had run for the Glades County Commission against Alvin Ward, and other in-laws had been elected to the state legislature long ago.

Peeples talked to family members about running for the School Board, and received encouragement.

She decided to run for the School Board in June, 2000, but there were no specific issues which caused her to run and she was not dissatisfied with the incumbent. Her campaign was largely self-financed; she received a $250 contribution from a friend in Miami and $100 from her brother-in-law; she utilized signs and mailings, and went door-to-door to all communities within the county that she could, including the Washington Park area. She felt uncomfortable campaigning in some of the very rural parts of the county where she did not know people. She did not make special effort to get the votes of people requesting absentee ballots.

Peeples did not have an opinion as to whether the at-large system was racially fair, but was concerned that the minority community might feel it was unfair. Peeples believed that while there may have been discrimination with regards to voting and participating in the political process when she was younger, everyone in Glades County now has the opportunity to run for office.

Tom Gaskins (Gaskins), the School Board member from District 3, testified by deposition that he has resided in Glades County for sixty (60) years, approximately his whole life. Gaskins graduated from Glades County High School in 1959, at a time when it was still segregated. He was either in college or the military when the schools were desegregated in 1969-70.

Gaskins, a Democrat, first ran for the School Board in 1988 when there was an open seat. Gaskins had thought about running for the position four years earlier, but decided not to run against the incumbent. Gaskins decided to run for the School Board because he had two sons in school, was interested in the schools, and believed he could do the job. Gaskins ran successfully for re-election in 1992, 1996, and 2000, having opposition in each year except 1992. The opposition was from Democrats in the primaries, not from Republicans. All four of his election campaigns were similar. Each was largely self-funded, costing Gaskins approximately $1,000 in 1988, $1500 in 1996, and $2,000 in 2000. He and his family did virtually all the campaign chores, and with the exception of the last campaign spent the weeks before the election going door-to-door and speaking at community meetings. In the 2000 election Gaskins did not have time to campaign door-to-door, and therefore utilized a mailer. Gaskins never sought out absentee voters. Gaskins believed knowing people in the county was the most important factor in the elections. He had no relatives who ran for public office or were employed by the County.

Gaskins testified that the only racial issue that ever came up was cleaning up Washington Park. No citizens have come to School Board meetings to complain about racial unfairness or redrawing the districts. Six years earlier, Crystal Drake wanted to run in a different district, but it was not changed.

Gaskins testified that in his opinion the at-large system did not work against minorities in Glades County because two of the three blacks who ran for office were elected. Gaskins testified that Charles Hall (Hall), an African American who lived in the Washington Park area of Glades County, was elected to the County Commission in 1976. Hall defeated Wayne Beck, a well-connected white male from a big family who had been a two or three term incumbent. Hall was the first African American to run for the county commission. Gaskins testified that Beamon Rich won election to the City of Moore Haven Council. Beamon had a good name in the county, and defeated white candidates. Gaskins testified that plaintiff Thompson did not campaign much in 2000 when she ran against incumbent Mike Pressley. She spoke in Muse in the western part of the county and was a good speaker. Even without campaigning much, she still received 40% of the vote. Gaskins testified that Jerry Bay did not campaign very hard in one election and was defeated by a person who campaigned very hard.

Gaskins testified that in his opinion the at-large election system is best, but would agree with whatever system the majority of Glades County voters wanted.

Mike Pressley (Pressley) is the District 4 School Board member and was the School Board chairman when he testified by deposition. Pressley lived in Glades County his entire life, graduating from high school in 1967 and attending the University of Florida

until graduation in 1971. He is a farmer who grows citrus and sugarcane. His father was the Sheriff of Glades County until his death in 1955 or 1956, upon which time his mother succeeded him as Sheriff and served the remainder of the term. His stepfather became the county judge for about twenty years, until his retirement. Pressley's wife is a school teacher and his daughter is a recently hired speech therapist in Glades County. Pressley testified that school desegregation resulted in a slow migration of transfers from Washington Park School so that by the time of his graduation approximately a third of his class was African Americans.

Pressley first ran for the School Board seat in 1982, and was successful. His mother had been a teacher in Glades County for twenty-seven years, and Pressley enjoyed living in Glades County and was interested in the school system. After speaking with his wife and local residents, he decided to run for election. There was a vacant seat at the time, and no particular issues. Pressley ran as a Democrat, although the office is now nonpartisan because of a change in Florida law. Pressley felt that party affiliation played a minor role, although an active Republican party is relatively new to the county. The executive committee of the Democratic Party had one active African American member that Pressley could recall. Pressley faced election opposition in 1982 and 1998 (plaintiff Thompson), and all his election campaigns have been primarily self-financed. Pressley went door-to-door throughout the county,

used political cards, and advertised in the paper and attended political rallies. Pressley solicited absentee votes in 1982, but was not sure about later elections. Plaintiff Thompson was Pressley's opposition in 1998, when both ran as Democrats. Pressley received 643 votes, and Thompson received 462 votes.

Pressley testified that African Americans have been appointed to School Board advisory committees. There are no current school issues of particular interest to the African American community, although there is an issue concerning access to the gymnasium at the Washington Park school leased facility which was being discussed.

Pressley did not take a public position on the 2001 referendum, and to his knowledge no one on the School Board or County Commission took a public position. Pressley took no position because he wanted to find out how the Glades County citizens felt about the issue. He personally prefers the county-wide election system because he likes to vote on all the people who will be representing him.

Susan T. Shriveler (Shriveler) testified by deposition that she is the School Board member for District 5. She grew up in LaBelle, Florida, attending high school there, and has a couple of college classes. Shriveler lived in Immokalee, Florida, before moving to Glades County six years before her testimony. She was employed as a deputy clerk in the Tax Collector's Office in Glades County, and her husband was a farm manager. Her aunt by marriage, Margaret

Vanderbilt, was on the first Glades County Commission in 1972, but she had no relatives employed by the County or School Board. Shriveler, a Democrat, ran for the School Board in November, 1998, her first effort at political office. She had been urged to run by Mrs. Green, a county social service worker, and discussed the matter with her family. She ran against incumbent Elmer Close, but he decided to retire after she entered the race and she had no opposition. Her campaign was largely self-financed with only a couple of donations; she did not go door-to door, attended one rally, and gave out pencils at Muse.

Shriveler favors the at-large system because School Board members work for the whole county. The 2001 referendum was in the paper, and people talked about it because they were interested in the issue. She did not express her opinion about the issue because she wanted voters to make up their own minds.

(2) County Commission Officials

K.S. Jones (Jones) testified by deposition that he was the County Commissioner for District 1. He is a railroad engineer and owns a nursery tree/lawn service/landscaping business. Jones has lived in Glades County since July, 1978, and was born in neighboring Clewiston, Florida.

Running as a Republican in 1988, Jones challenged the incumbent, spent three months campaigning door-to-door throughout the county and speaking

at political rallies and association meetings, and soliciting absentee votes, and lost. He ran for an open seat in 1992 because of the lack of a tax base for the county and other economic issues which needed exploration. There were other candidates, and Jones won as a Republican using the same campaign practices as in 1988. Jones was re-elected in 1996, again following the same campaign practices as in prior years. In 1997 he switched to the Democratic party because that was more closely aligned with his constituents; he estimated that Glades County was only 19% Republican. Jones was re-elected in 2000 as a Democrat. Jones had no relatives who had run for public office or were employed by Glades County, and he had not been involved in politics prior to 1988. In his years on the County Commission there were never any racial issues in any of the elections.

Jones favors the current at-large system, and noted that two of the three African Americans who ran for public election were elected the first time they ran (Beamon Rich and Charles Hall). Jones identified James Davidson, a Mr. Pierce, and Linda Brown as African Americans who were appointed to County Commission committees upon his recommendation.

Alvin Ward (Ward) testified by deposition that he was the County Commissioner for District 2 and is a Democrat. He has lived in Glades County for his entire 47 years. Ward's father was a city commissioner in the City of Moore Haven in the late 1970s, then Mayor of Moore Haven, then on the County Commission in the early 1980s; he died in 1983. Ward

has in-laws employed by the School Board as teachers or in other similar capacities. He has a number of relatives who work for the county. Ward was in grade school when desegregation was implemented.

Ward first ran for the County Commission in 1994 and lost. He entered the race late, went door-to-door to about 70% of the county, and attended community meetings. He used a couple of weeks vacation time to campaign. In 1996 a commissioner resigned and Ward ran against three other Democrats and won for the remaining two years of the term. Ward went door-to-door over the entire county, and took four or five months off to campaign. There were no major issues in the campaign, and Ward stressed better roads and being a fiscal conservative. As was typical in most county elections, the focus was on personal qualifications and not issues. In 1998 Ward ran without opposition. Ward's campaigns were largely self-financed, with a few contributions. He estimated that he spent $4,000 in 1994, $5,000-6,000 in 1996, and very little in 1998. Ward testified that there have been no racial issues in Glades County since he's been an adult or since he was on the County Commission. The County Commission helped the Washington Park community when specific requests were made, as it did with other communities in the county. Ward's experience has been that it is hard to get people to serve on committees, although he has asked people to do so once or twice.

Ward testified that the 2001 referendum was discussed at the community center meetings, including Muse. Most of the people wanted the at-large system; Ward did not take a position on the issue during the referendum, and none of the commissioners took an official position.

Franklin Simmons (Simmons) testified by deposition that he was the County Commissioner from District 4. Simmons was born and resided in Glades County for his entire life except for time in the military (1955-58) and time thereafter when he lived in Clewiston until the late 1970s when he moved back to Glades County. Simmons has no relatives who ran for office; he does have a relative who works for the county. A 64-year old Democrat, Simmons was first elected in District 2 in 1990, and the boundaries were thereafter changed and he ran in District 4, most of which is in Moore Haven. Simmons ran for public office in 1990 because his property taxes kept going up each year and he thought he could made a difference if he was on the Board of County Commissioners. He was opposed in 1990 and 1994, but ran unopposed in 1998. His campaigns have been largely self-financed, with an emphasis on door-to-door contacts. Most of the campaigns were individual oriented, not issue oriented, and he never made any effort to get absentee votes. There were never any racial issues in any of the elections. Simmons' experience was that it was hard to find people willing to serve on boards and committees, although he tries to do so because a diversity of views is good for the

county. An African American named Davidson was appointed to a committee or board. Simmons strongly opposed the 2001 referendum calling for single-member districts because it was important for the citizens to have the opportunity to vote on each of their representatives. He voiced this opinion during the referendum, but felt that the majority of citizens simply did not care because there was a very low turnout. He remains strongly opposed to the idea.

(3) Supervisor of Elections:

Holly Whidden Green (Green), the Democratic Supervisor of Elections of Glades County, grew up in Glades County, went to public high school in Glades County, and attended Edison Community College in Fort Myers. She applied for a position as a deputy Supervisor of Elections in Glades County after seeing a newspaper advertisement, and served in that position for two years. In 1984 the office was vacated and Lee Watson was appointed by the Governor for the duration of the unexpired term. Green had been among the finalists recommended by the Democratic Party, but the Governor did not make an appointment from those recommendations. Green consulted her husband and family, and also the former supervisor of elections and some friends, and decided to run for the office. The 1984 campaign was financed by her family, and was not as expensive as today. Green went door-to-door throughout the county, painted plywood signs, advertised in the newspaper, had cards printed, and solicited absentee votes. Green resigned as deputy

supervisor to run for election, and campaigned for six months, six days a week, twelve hours a day. Three Democrats ran in the primary, and Green and Watson were in the October runoff, which Green won; there was no Republican opposition in the general election. She spoke at political forums, including in the Washington Park community. There were no issues in the election.

Green ran without opposition in 1988, but had opposition in 1992, 1996, and 2000. These campaigns were also self-financed, and were conducted in basically the same manner as in 1984, except that since she was working she had less time to be personally involved. Green felt that the most important aspect of campaigning now is getting out and seeing the people. There were no specific issues in any of the campaigns. Normally about ten percent of the votes are by absentee ballot. Green is a member of the Lakeport Community Association, the Glades County Youth Livestock Association, the Glades County and the Florida Cattlemen's Association, and recently the Women of the Moose, but did not have an opinion as to whether membership helped in her campaigns.

Green's brother ran unsuccessfully for the Glades School Board in the 1980s. A sixth or seventh cousin served on the Glades County Commission from the early 1970s through early 1980s. Her cousin ran unsuccessfully for county property appraiser in about 1993. Green's brother is employed by Glades County as the manager or supervisor of the landfill; her sister is a judicial assistant for the county judge; her

nephew and a distant cousin work for the property appraiser's office; her ex-sister-in-law works for the tax collector; and a cousin is the county extension agent.

Shirley Bryce, a black female, is Green's deputy supervisor of elections, and Bonita Hyatt, another black female, works in the finance department of the clerk of the circuit court.

Every election day people contact her office saying they were registered to vote but their name was not on the list. This is often because of problems with implementation of the 1995 Motor Voter Law, although some people simply are not registered. When an individual voter brings it to Green's attention, she takes care of it for them as best she can.

The 2001 referendum was publicized in the newspaper with a notice of election on the front page, and received quite of bit of newspaper coverage. Various community associations had meetings about the referendum, three of which Green attended. Green explained that the referendum was by mail ballot, a decision made by the County Commission and School Board because it was less expensive and, based upon past experience in Glades County, a mail ballot resulted in a higher percentage voter turnout. There are currently about 6,000 registered voters in Glades County.

(4) Plaintiffs' Testimony:

Plaintiff Billie Thompson (Thompson) ran against Pressley in the 1998 School Board election. Thompson resides in Moore Haven, and her child, four step-children, nephew, and grand child attended Glades County schools. Thompson began her career in education in the Glades County School system, working for twelve years in a clerical position at Moore Haven elementary school. Thompson received her teacher certification in 1989, and was hired by the Hendry County School system, where she is a seventh grade teacher.

Thompson ran for the School Board because she perceived some things in areas where all children were not necessarily treated equally, and felt like she could give back to her community by being a voice. She spoke with and received encouragement from a number of people. She campaigned in the communities throughout Glades County, posted flyers, utilized newspaper advertising, and went door-to-door. She campaigned in ninety percent of the county, covering all the major voting areas, although there were some areas in which she felt apprehensive being a black female. She went to one rally in the Muse area, and two others were cancelled because there was no voter interest. She had several volunteers, including co-plaintiff Patricia Brown, and felt she had a small but effective campaign. While she had never asked the School Board or the County Commission to change anything, it was her impression that historically

black people in the county did not get a favorable response getting people to change things. She never asked the School Board or the County Commission to place the question of going to single member districts on the ballot for a referendum.

Patricia Brown (Brown) testified that she is a school bus driver for the Hendry County School District and has lived in Glades County for nineteen years. Three of her children attended school in Glades County, and the fourth is handicapped and attends school in Hendry County. Brown worked on Thompson's 1998 School Board campaign, and felt they made a credible showing with 40 percent of the vote. Brown was not too happy that the 2001 referendum was done by mail ballot because of privacy concerns, and opined that African-Americans did not vote because of similar concerns.

III. Voting Rights Act Application

The Court will first examine the *Gingles* threshold factors and will then look to the other factors which are required to be considered.

A. *Gingles* Preconditions:

Defendants assert that plaintiffs have failed to establish any of the three *Gingles* preconditions. Plaintiffs argue they have established all three. To prevail on a vote dilution claim under Section 2 of the

Voting Rights Act, plaintiffs must prove *all* of the *Gingles* factors, and if any is not established there is no vote dilution claim established. *Hamrick III,* 296 F.3d at 1073.

(1) Compactness or Numerosity, i.e., Viable and Proper Remedy:

The first *Gingles* factor requires that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles,* 478 U.S. at 50. This has been consistently interpreted in the Eleventh Circuit as requiring plaintiffs to demonstrate the existence of a viable and proper remedy. *Burton v. City of Belle Glade,* 178 F.3d at 1199 (citing cases); *Davis v. Chiles,* 139 F.3d 1414, 1423 (11th Cir.1998). The need of a viable remedy was recently affirmed in the context of constitutional claims of vote dilution: "Regardless of the precise contours of justiciability, there is no doubt that the Appellants must demonstrate that the federal courts have the power to grant a viable remedy." *Levy v. Miami-Dade County,* 358 F.3d 1303, 1305 (11th Cir.2004).

In a section 2 case, the proper statistic for deciding whether a minority group is sufficiently large and geographically compact is voting age population as refined by citizenship. *Negron v. City of Miami Beach, Fla.,* 113 F.3d 1563, 1568 (11th Cir.1997) (citing cases); *Clark,* 293 F.3d at 1263, n. 2. In assessing the

proposed remedy, the Court looks to the totality of the circumstances, weighing both the state's interest in maintaining its election system and plaintiffs' interest in the adoption of the suggested remedial plan. *Davis v. Chiles,* 139 F.3d at 1419-20; *Brooks v. Miller,* 158 F.3d 1230, 1239-40 (11th Cir.1998). The remedial plan must itself comply with § 2. *Dillard v. City of Greensboro,* 74 F.3d 230, 233 (11th Cir.1996).

Plaintiffs produced a proposed five-district map prepared by William S. Cooper utilizing census block population data from the 2000 *Census of Population and Housing PL 94-171.* (Plaintiffs' Exhibits 33 and 34). This plan re-draws the five voting districts so that one district (District 1) has a threadbare African American majority. The parties stipulated that the districts in this plan are compact and contiguous and follow traditional redistricting criteria. (Doc. # 41, pp. 14-15, ¶ 8). Thus, District 1 is geographically compact for § 2 purposes. *Abrams,* 521 U.S. at 91-92.

Under plaintiffs' plan, virtually all of the African Americans in Glades County are packed into the proposed District 1, as the following chart demonstrates.

District	Total Population	Percentage African American	Percentag Voting Age African American
1	2029	50.91%	50.23%
2	2183	2.15%	1.95%
3	2211	0.54%	0.44%
4	2080	0.24%	0.23%
5	2073	0.77%	0.95%[4]
Total:	10,576	10.52%	10.12%

To achieve a majority African American district, however, the proposed plan under-populated District 1 by 86 persons and overpopulated the contiguous District 2 by 68 persons. Additionally, District 3 is over-populated by 96 people, while Districts 4 and 5 are under-populated by 35 and 42 persons respectively. The parties stipulate that the overall deviation in the plan is 8.6%. (Doc. # 41, pp. 14-15, ¶ 8). The district population numbers are as follcws:

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[4] This percentage is taken from plaintiffs' plan, Exhibit 34, although it seems unlikely that the percentage of voting age African Americans in the district exceeds the percentage of total African Americans in the district. In response to a post-trial inquiry from the Court, plaintiffs' counsel advised that Mr. Cooper confirmed the accuracy of the percentages. In terms of actual people, District 5 has 17 African Americans, and 14 voting age African Americans.

District	Population	Deviation	% Deviation
1	2029	-86	-4.07
2	2183	+68	+3.22
3	2211	+96	+4.54
4	2080	-35	-1.65
5	2073	-42	-1.99

Plaintiffs have thus proposed a plan with a majority African American district, although just barely, thereby literally complying with the first *Gingles* requirement.

Defendants argue, however, that plaintiffs have not actually satisfied this *Gingles* requirement for three reasons. First, the razor-thin majority of African Americans is in reality only an influence district; second, an influence district is an insufficient remedy to support the § 2 claim; and third, the proposed district violates constitutional and statutory requirements for equally populated districts and is therefore unlawful.

The problematic aspect of the plan results from the small number of African Americans in Glades County, and the attempt to have approximately ten percent of the population secure twenty percent of the seats on the School Board and the County Commission. Indeed, African Americans are not the largest minority in the county; that distinction belongs to Hispanics. As *Gingles* stated, "if, although geographically compact, the minority group is so small in relation to the surrounding white population that it

could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multi member electoral structure." 478 U.S. at 50 n. 17. Here, District 1 would be majority African American by a margin of a few voting age people. To translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person. Nothing in the record suggests voter registration, voting rates, or voter practices which would give real-world meaning to the statistically sufficient district. The Court finds the proposed District 1 is in reality only an influence district.

Plaintiffs argue essentially that their proposed district is close enough, and that even if does not contain a realistic majority, a minority influence district is sufficient to satisfy the first *Gingles* requirement. The Supreme Court has not decided whether an "influence district" is sufficient under the first *Gingles* requirement, or put another way, whether influence-district claims are viable under section 2. *Johnson v. De Grandy,* 512 U.S. at 1008-09; *Voinovich v. Quilter,* 507 U.S. at 154; *Growe v. Emison,* 507 U.S. 25, 41 n. 5, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); *Thornburg v. Gingles,* 478 U.S. at 46-47, nn. 11-12.[5] The Eleventh Circuit recently held that an

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[5] In contrast to a § 2 claim, the Supreme Court has held that creation of influence districts may suffice in § 5 preclearance

(Continued on following page)

influence district does not satisfy the § 2 requirement. *Dillard v. Baldwin County Comm'rs,* 376 F.3d 1260 (11th Cir.2004). This is consistent with prior Eleventh Circuit cases. *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm.,* 906 F.2d 524, 527 n. * (11th Cir.1990) (declining to consider issue, but noting that the real problem in the case was that the black population was too small and scattered too widely across the county); *Nipper,* 39 F.3d at 1531 (plaintiff must demonstrate that the challenged system suppressed voting strength in comparison to some alternative, feasible benchmark system); *Johnson v. DeSoto County,* 204 F.3d at 1343 (first *Gingles* precondition not satisfied without district containing a majority of voting age blacks); *Negron,* 113 F.3d at 1571 (districts which were not voting age majority of Hispanic American citizens did not satisfy the first *Gingles* factor in a vote dilution claim). The Court concludes that the influence district in this case is not a viable remedy under § 2.

Finally, defendants argue that plaintiffs have not established a *legally acceptable* majority minority single member district, even if statistical form is accepted over political reality. Defendants essentially

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proceedings under the Voting Rights Act. *Georgia v. Ashcroft,* 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). The Court noted, however, the very different nature of a § 2 claim. *Id.* at 2510-11. *See also Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 477-80, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (noting the substantial differences between § 2 and § 5).

argue that the plan is the product of unlawful racial gerrymandering.

With a population of 10,576, the ideal population size of each of the five districts is 2,115 persons. *Clark,* 293 F.3d at 1264 n. 6. This is necessary to satisfy the constitutional requirement of "one-person, one-vote." *Hadley v. Junior College Dist.,* 397 U.S. 50, 56-57, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970) (requirement applies to school board districts); *Avery v. Midland County,* 390 U.S. 474, 481-85, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968) (requirement applies to county commission districts). Exact population equality is not required; while there is no bright-line numerical test to determine when a deviation is significant enough to violate the constitutional requirement, there must be little more than *de minimis* variation in a court-ordered plan. *Abrams v. Johnson,* 521 U.S. at 98-101 (court-ordered districts held to higher standard of population equity than legislative ones); *Clark,* 293 F.3d at 1276. Where the legislature creates the districts, a deviation under ten percent is a minor deviation; over ten percent creates a *prima facie* case of Fourteenth Amendment discrimination. *Voinovich,* 507 U.S. at 160-61. The Court concludes that the stipulated 8.6% overall deviation, when considered with all the circumstances of this case, violates the one-person one-vote requirement of the United States Constitution.

For the reasons stated above, plaintiffs have not shown they satisfy the first *Gingles* requirement. Accordingly, their § 2 Voting Rights Act claim fails.

For the sake of completeness, the Court will continue with the required analysis.

(2) Minority Cohesion or Bloc Voting:

The second factor requires a showing that the minority group is politically cohesive. *Gingles,* 478 U.S. at 51; *Burton v. City of Belle Glade,* 178 F.3d at 1201. Defendants argue that the election history of Glades County establishes that African American voters are not politically cohesive and do not always vote as a block.

Dr. Steven Parker Cole (Dr. Cole) is a research psychologist who testified as an expert in research methods and computer analysis of racially polarized voting. Dr. Cole examined the following six elections in Glades County which involved contests with African American and white candidates, utilizing ecological regression analysis and homogeneous precinct analysis: the 1984 Presidential Preference Primary involving African American candidate Jesse Jackson; the 1988 Presidential Preference Primary involving African American candidate Jesse Jackson; the 1990 Democratic Primary for Secretary of State involving African American candidate Alcee Hastings; the 1994 Democratic Primary for State Commissioner of Education involving African American candidate Doug Jamerson; the 1994 General Election for State Commissioner of Education involving African American candidate Doug Jamerson; and the 1998 Democratic Primary for School Board District 4 involving African

American candidate Billie D. Thompson. Dr. Cole also examined the 2001 Special Referenda concerning election from single-member districts. Dr. Cole concluded that all elections except the 1994 Democratic Primary and the 2001 Referenda were racially polarized elections, and that African American voters in Glades County are politically cohesive. Dr. Cole estimated that 75% of the African American voters and 26% of the white voters voted for Thompson. Dr. Cole testified that it is common for a Democratic primary election involving candidates of different races to tend to be less polarized than in the general election. Dr. Cole did not examine the two elections in Glades County in which African American candidates won, or any election in which there were no African American candidates.

The Court is free to reject expert testimony, even if uncontested. *Abrams,* 521 U.S. at 92; *Negron v. City of Miami Beach,* 113 F.3d at 1570. While the research was not exhaustive, it is sufficient to convince the Court that African Americans in Glades County are politically cohesive.

(3) Majority Bloc Voting:

To establish the third *Gingles* factor, a plaintiff must show white bloc voting sufficient to defeat the minority's preferred candidates. *Gingles,* 478 U.S. at 49, 56. This requires that plaintiffs show: (1) that whites vote as a bloc; (2) that white bloc voting *regularly causes* the candidate preferred by

black voters to lose; and (3) that blacks and whites *consistently* prefer different candidates. *Hamrick III,* 296 F.3d at 1074; *Johnson v. Hamrick,* 196 F.3d 1216, 1221 (11th Cir.1999).

Defendants argue that this condition cannot be satisfied because Glades County voters have elected two African Americans, one to the County Commission and one to the City Council of Moore Haven, and plaintiff Thompson received a very respectable 40% of the vote in her 1998 School Board race. While probative, this success does not negate a conclusion that there is legally significant bloc voting. *Hamrick III,* 296 F.3d at 1074. The Court must be careful not to place too great a significance on the election of a single minority, because there are other explanations than a non-discriminatory election system. *NAACP v. Gadsden,* 691 F.2d at 983. More important to the third *Gingles* prong are larger trends and patterns, keeping in mind factors such as incumbency and the absence of an opponent which may explain divergences in individual elections. *Hamrick III,* 296 F.3d at 1074.

Dr. Cole examined the six Glades County elections discussed above and concluded that average white crossover vote was a very low 19.2%, and that white voters in Glades County tend to vote as a bloc so as to usually defeat the candidate of choice of African American voters. The Court concludes that this testimony, together with the totality of the facts and circumstances presented, satisfy the third *Gingles* prong.

B. Totality of the Circumstances Factors:

(1) History of Official Discrimination:

The Court considers the extent of any history of official discrimination that touched the right of African Americans to register, to vote, or otherwise to participate in the democratic process in Glades County. Even if the electoral system is found to have had a discriminatory intent and purpose, plaintiff must also show discriminatory results in order to establish a section 2 violation. *Brooks v. Miller,* 158 F.3d at 1237.

It seems clear on the facts presented, and the Court so finds, that the 1947 enactment of the at-large school board system was for the purpose of diluting the vote of African Americans. *NAACP v. Gadsden,* 691 F.2d at 982 (reversing as clearly erroneous the district court's finding that enactment of 1947 at-large school board system was not for the purpose of diluting black vote); *McMillan v. Escambia County,* 638 F.2d 1239, 1245-46 (5th Cir.1981) (same). It is less clear, as Dr. Mormino's report indicated, whether the same was true with the 1900 change in the county commission system. In any event, as discussed in more detail below, Florida has a history of racial discrimination and African Americans suffer in some ways from the effects of that discrimination. Despite this fact, there is no evidence that the ability of African Americans to participate in the political process in Glades County is currently hindered by that discrimination. Thus, the Court concludes that

although there is a history of official discrimination that touched the right of African Americans to register, to vote, or otherwise to participate in the democratic process in Glades County, African Americans are not currently significantly affected or hindered by that discrimination.

(2) Racially Polarized Elections:

The Court next considers the extent to which voting in the elections of Glades County is racially polarized. Dr. Cole concluded that all elections he examined except the 1994 Democratic Primary and the 2001 Referenda were racially polarized elections. Further, as discussed above, the Court found the evidence sufficient to establish racially polarized voting within the meaning of *Gingles,* i.e., minority cohesion or bloc voting and majority bloc voting. As explained below, however, there was no evidence of overt appeals to race or even racially sensitive local election issues.

(3) Voting Practices or Procedures:

The Court considers the extent to which Glades County has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against African Americans.

As discussed above, Glades County is approximately 988.2 square miles and averages 13.5 people per square mile. Thus, it is sparsely populated and presents a vast area to cover in an at-large election. Many of the witnesses testified that much of the campaigning in Glades County is done by going door to door and sometimes utilizing mailings. As a result, the lower economic status of African Americans in Glades County discussed previously could cause African Americans to have a greater difficulty campaigning. This campaign disadvantage is lessened somewhat by the fact that, as witnesses testified, significant campaigning in Glades County also is done by attending community meetings and political rallies.

As explained above, for both the County Commission and the School Board in Glades County there is a majority vote requirement to win the party nomination but not the general election. However, because most candidates in Glades County are Democrats, voters usually decide races during the primary elections. Thus, most races effectively are decided ultimately by majority vote. The existence of this mechanism can operate in a manner that dilutes the minority African American vote in Glades County.

Plaintiffs do not contend that Glades County has any official anti-single shot policy. Nor do plaintiffs assert that the ballots in Glades County are set out in such a way to suggest that voters must vote for a full slate of candidates rather than in a single shot fashion. Finally, there was no evidence of other voting

practices or procedures that may enhance the opportunity for discrimination against African Americans.

Based on these factors, the Court finds that only the majority vote requirement, and to a lesser extent the size of Glades County, enhance the possibility of discrimination against African Americans in Glades County. No other voting practices or procedures were sufficiently proven to exist or to otherwise have a discriminatory impact upon African Americans in the county.

(4) Access to Candidate Slating Process:

If there is a candidate slating process, the Court considers whether African Americans have been denied access to that process. Both parties agree that there is no slating process in Glades County, so this factor is not relevant.

(5) Effects of Other Areas of Discrimination:

The Court next considers the extent to which African Americans in Glades County bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process. Florida has a history of racial discrimination, and African American citizens suffer in some ways from the effects of Florida's statutory history of purposeful discrimination. African American residents of Glades

County suffer lingering socio-economic disadvantages from the past discrimination. These socio-economic conditions hinder to some extent the ability of African American residents of Glades County to run for public office. For example, as previously discussed, the size of Glades County makes at-large campaigning for elective office difficult, and more so for African Americans, who the evidence shows are less likely to own vehicles to transport them to the areas of the county necessary to speak with potential voters. While certainly disadvantageous, the Court finds that these factors do not severely impair equal footing in the political process, or significantly reduce participation in the political process. As Ms. Brown demonstrated, an African American candidate using the same campaign techniques as typical in Glades County can make a respectable showing, even though she was a political novice and was running against an incumbent who was the president of the school board. Little evidence of overt discrimination in Glades County was presented, other than school segregation until the mid-1960s.

(6) Racial Nature of Political Campaigns:

The Court next considers whether political campaigns in Glades County have been characterized by overt or subtle racial appeals. Plaintiffs and defendants agree that there is no evidence of any such overt or subtle racial appeals in Glades County political campaigns. The Court concurs.

(7) Minority Elections to Public Office:

The Court considers the extent to which African Americans have been elected to public office in Glades county. In its history, one African American has run for the Glades County Commission, and that person was elected. Charles Hall was elected in 1976, winning a run-off primary by nine votes, 738 to 729. Hall served a four year term, and did not run for re-election. In its history, one African American has run for the Glades County School Board, and that person was not elected. Plaintiff Patricia Thompson was defeated by incumbent School Board president Robert Pressley in 1998. In its history, one African American has run for the City of Moore Haven City Council, and that person was elected. Beamon Rich was elected in September, 1988, placing third in a seven candidate race and receiving 16.2 percent of the votes.

The Court concludes that the history of elections in Glades County shows some electoral success by African American candidates for public office. Such success, while not dispositive, undercuts plaintiffs' claims that African Americans have been denied equal access to the political process in Glades County.

(8) Significant Lack of Responsiveness:

The Court considers whether there is a significant lack of responsiveness on the part of elected

officials in Glades County to the particularized needs of African Americans. Responsiveness or lack thereof is relevant to showing discriminatory intent in the maintenance of the electoral system. *NAACP v. Gadsden,* 691 F.2d at 983. "An official is responsive if he/she ensures that minorities are not excluded from municipal posts, evenhandedly allocates municipal services, and addresses minority complaints." *Hall v. Holder,* 117 F.3d at 1227. Little specific evidence of a lack of access or responsiveness was presented. The weight of the convincing evidence establishes a responsiveness to the minority community. Additionally, during the course of this litigation, the County sponsored two referendum questions concerning the change in the system suggested by plaintiffs in order to determine the views of county residents. Thus, the Court concludes that there has not been a significant lack of responsiveness to the needs of the African American community.

(9) Tenuous Policy:

The Court considers whether the policy underlying Glades County's use of voting qualifications, prerequisite to voting, or standard, practice or procedure is tenuous. There is no evidence of such tenuous practices, procedures, or policies in Glades County.

(10) Number of Majority-Minority Districts:

As discussed above, there are no districts which contain a majority of minority members.

(11) Minority Members' Share of Relevant Population:

As also discussed above, African Americans in Glades County constitute approximately ten percent of the population. Although African Americans have achieved some electoral success, African Americans have not achieved representation on the School Board or the County Commission proportional to their share of the population in Glades County.

In conclusion, after considering the eleven factors discussed above, the Court concludes that, under the totality of the circumstances, plaintiffs have not met their burden of showing that the challenged electoral scheme had the effect of depriving them of an equal measure of political and electoral opportunity to participate in the political process and to elect representatives of their choosing.

IV. Constitutional Application

A. Fourteenth Amendment

The Eleventh Circuit has questioned whether any plaintiff challenging an electoral system like a Florida county's can establish a constitutional vote dilution claim where his section 2 claim has failed. *Johnson v. DeSoto County Bd. of Comm.*, 204 F.3d at 1344-45. Assuming it is possible, the Court concludes that the Fourteenth Amendment has not been violated in Glades County, Florida. There is no evidence of a discriminatory purpose in the enactment of policies in Glades County or in the operation of those

practices or procedures in Glades County. The record fails to show that any inequality of opportunity results from the county's current electoral system.

B. Fifteenth Amendment

The Eleventh Circuit does not recognize a vote dilution claim under the Fifteenth Amendment. Even if such a claim exists, Plaintiffs have not established such a claim in this case. Plaintiffs have not shown sufficient evidence that African Americans are denied the right to register or cast ballots by the system in Glades County. The anecdotal testimony from Ms. Brown as to the single event involving her situation in 1998 fails to carry the burden.

V. Conclusion

From the evidence presented, the Court finds that plaintiffs have not established a violation of the Voting Rights Act, the Fourteenth Amendment, or the Fifteenth Amendment. Accordingly, the Clerk of the Court shall enter judgment in favor of defendants and plaintiff shall take nothing. The Clerk of the Court shall close the file.

DONE AND ORDERED.

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493 F.3d 1253

United States Court of Appeals, Eleventh Circuit.

Billie THOMPSON, Patricia Brown,
Plaintiffs-Appellants,
v.
GLADES COUNTY BOARD OF COUNTY COMMISSIONERS, Glades County School Board, et al., Defendants-Appellees.

No. 05-10669.

July 24, 2007.

Neil Bradley, ACLU Foundation, Inc., Atlanta, GA, Cristina Correia, Avondale, GA, for Plaintiffs-Appellants.

Gavin Wallace O'Brien, Gavin W. O'Brien, P.A., Holmes Beach, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, BARKETT and GOODWIN,* Circuit Judges.

BARKETT, Circuit Judge:

This is a vote dilution case. African American voters in Glades County, Florida, challenge the at-large method of electing members of the County Commission and School Board, claiming that it

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* Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

depreciates their right to vote on account of their race in violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments. Following a bench trial, the United States District Court for the Middle District of Florida denied relief. The Plaintiffs now appeal the court's judgment. We reverse and remand.

I.

A.

Glades County spans approximately 988.2 square miles of southwest Florida. According to the 2000 decennial census, the county had an overall population of 10,576, and a voting age population of 8,329. Of the overall population, 69.4% were white, 15.0% were Hispanic, and 10.5% were African American. Of the voting age population, 73.2% were white, 12.7% were Hispanic, and 10.1% were African American.[1] Population numbers alone, however, do not portray the unique geographic character of the minority population in Glades County. Most of the Hispanic population is dispersed across the southern portion of the county, but the African American population is

[1] The Hispanic population in Glades County appears to be on the rise, significantly outpacing the modest growth of the African American population. In ten years (1990-2000), the African American voting age population rose from 9.6% to 10.1%, while the Hispanic voting age population eclipsed the African American voting age population, increasing from 6.7% to 12.7%.

concentrated in an area known as Washington Park, which sits in Moore Haven, the county's seat and largest city.

The County Commission and the County School Board both consist of five elected members who serve staggered, four-year terms. Likewise, the same election scheme governs both the County Commission and the School Board: the county is divided into five residential districts, and candidates run from the district in which they live, but at-large voting determines the outcome of each election.[2] Candidates that receive a majority of the countywide vote in a primary election are selected as their political party's nominee,[3] and a plurality of the countywide vote is sufficient to win the general election.

During the 1998 Democratic Primary for School Board District Four, Mike Pressley won the two-candidate contest with 58.2% of the vote, defeating plaintiff Billie Thompson, who garnered 41.8% of the vote.[4] Prior to 1998, however, the only other African

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[2] The at-large voting scheme provides that all voters in the county may cast ballots for any of the seats on the County Commission or School Board (and for at most one candidate per district).

[3] The County Commission elections are partisan and School Board elections became non-partisan due to a Florida statutory change effective January 1, 2000.

[4] In the same year, African American candidate Beamon Rich won election to the City Council for the City of Moore Haven. Rich placed third in a seven-candidate race with 16.2%

(Continued on following page)

American candidate for countywide office on either the County Commission or School Board was Charles Hall, who won a seat (by a nine-vote margin during a run-off primary election) on the County Commission in 1976.

B.

This law suit commenced on May 4, 2000. The Plaintiffs, Billie Thompson and Patricia Brown, African Americans, reside in Glades County and are registered to vote there. The defendants consist of the Board of County Commissioners and its five members, the County School Board and its five members, and the Supervisor of Elections. The complaint contained three "causes of action."[5] The first is that the at-large schemes for the election of members of the County Commission and School Board were adopted by the State of Florida and have been maintained for the purpose of diluting, minimizing, and canceling out the voting strength of African Americans in violation of § 2 of the Voting Rights Act.[6] The second

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of the vote; the three candidates who receive the most votes are elected to the City Council.

[5] These claims for relief are asserted together rather than in separate counts.

[6] The complaint alleges that the at-large election schemes for the County Commission and School Board, "including the use of majority vote, residency districts, and staggered terms, with no provision for limited or cumulative voting or other non-majoritarian election procedures, results in the denial or

(Continued on following page)

and third causes of action allege, respectively, that the same at-large electoral schemes deny the Plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment,[7] and their rights under the Fifteenth Amendment.[8] For relief, the complaint sought a declaratory judgment that the challenged schemes were invalid under § 2 and the Fourteenth and Fifteenth Amendments, injunction against their further use, and the creation of "new procedures or plans for election" of the members of the County Commission and School Board.

The defendants, in their answers, denied that the challenged electoral schemes diluted the Plaintiffs' right to vote, and asserted, moreover, that a remedy could not lawfully be created to enhance the Plaintiffs' voting power. As the case proceeded toward trial, the Plaintiffs proposed what they contended would be a remedy that met the requirements of law, specifically the Supreme Court's decision in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986): the County Commissioners and School Board

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abridgement of the [plaintiffs' right] to vote on account of race or color."

[7] The Equal Protection Clause of the Fourteenth Amendment states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 2.

[8] The Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

members would reside in and be elected from five single-member districts, one of which would contain an African American majority among the voting age population.

The filing of this law suit invited a non-binding special referendum that was held on June 5, 2001. Two questions were presented: (1) "Shall the five members of the Board of Commissioners of Glades County, Florida, be elected to office from single-member districts by the electors residing in each of those districts only?"; and (2) "Shall the five members of the School Board of Glades County, Florida, be elected to office from single-member districts by electors residing in each of those districts only?" A majority of those voting opposed single-member districts. The final tally for the County Commission indicated 825 votes (53.4%) opposed to single-member districts, and 719 votes (46.6%) in favor of changing the election scheme. Of these votes, in precincts with an African American voting age population of 90% or greater, 52% voted in favor of single-member districts; in precincts with a white voting age population of 90% or greater, 48% voted in favor of single-member districts. With regard to the School Board, the final tally indicated 848 votes (54.9%) opposed to single-member districts, and 698 votes (45.1%) in favor of changing the election scheme. Similarly, in precincts with an African American voting age population of 90% or greater, 52% voted in favor of single-member districts; in precincts with a white voting age

population of 90% or greater, 47% voted in favor of single-member districts.

The case went to trial before the district court on October 10, 2001. The court heard the testimony of four witnesses (the Plaintiffs and two of their experts), received the Plaintiffs' exhibits, which included the reports of a third expert, and the parties' stipulations, and then recessed the proceeding to await the filing of depositions. Over the next several days, the Plaintiffs filed the depositions of eight members of the County Commission and School Board and the Supervisor of Elections. On November 14, the court reconvened the proceeding to hear the parties' closing arguments, which focused on the Plaintiffs' proposed illustrative redistricting plan and the defendants' reasons why the plan could not be lawfully implemented.

The Plaintiffs relied on three expert witnesses: (1) William S. Cooper, who prepared the Plaintiffs' illustrative plan[9] for five single-member districts;[10] (2) Dr. Steven P. Cole, who analyzed statistics relating to

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[9] The record suggests that the Plaintiffs proposed only one illustrative plan at trial.

[10] Cooper did not testify; instead, he proposed a report which was introduced into evidence without objection. The report contained the Plaintiffs' illustrative plan based on 2000 census figures from the *Census of Population and Housing PL 94-171*. The parties stipulated that the districts drawn in the plan are compact, contiguous, and otherwise follow the requisite redistricting criteria.

Glades County voter behavior;[11] and (3) Dr. Gary R. Mormino, who provided socio-political background to Florida's adoption of statutes and constitutional provisions affecting the method of election to the County Commission and School Board.

The illustrative plan proposed by the Plaintiffs contains five new single-member districts. Among the new districts, District One contains a slim African American voting age majority. Specifically, 50.23% of the voting age population in District One is African American[12] and 15.23% is Hispanic. The total minority voting age population in District One (inclusive of other minorities such as American Indians) is approximately 67%. With a total population of 10,576 in Glades County, each of the five new districts would ideally have a population approximating 2,115 in order to comport with the one-person, one-vote principle under the Fourteenth Amendment. Among the five districts, the plan has an overall deviation of 8.6%, with District One underpopulated by 86

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[11] Cole analyzed seven election contests involving African American and white candidates that took place from 1976 through 1998: the 1976 Democratic Primary for County Commission, the 1984 Presidential Preference Primary, the 1988 Presidential Preference Primary, the 1990 Democratic Primary for Secretary of State, the 1994 Democratic Primary for State Commissioner of Education, the 1994 General Election for State Commissioner of Education, and the 1998 Democratic Primary for School Board District Four.

[12] Cooper's statistics defined African Americans as "non-Hispanic blacks."

individuals. The following table summarizes the salient features of the Plaintiffs' illustrative plan:

District	Total Population	Deviation (persons)	Percent Voting Age Hispanics	Percent Voting Age African Americans
1	2,029	-86	15.23%	50.23%
2	2,183	+68	13.30%	1.95%
3	2,211	+96	1.81%	0.44%
4	2,080	-35	1.99%	0.23%
5	2,073	-42	35.19%	0.95%

The distinctive feature of this illustrative plan is that nearly the entire 834-person population of voting age African Americans in Glades County is contained within District One, which is, itself, dwarfed in size by the other districts (due to the large concentration of African Americans in Moore Haven). In sum, 775 of the 834 voting age African Americans (92.9%) would be residents of the proposed District One.

C.

The district court issued its decision in this case on August 27, 2004, in the form of a 49-page Opinion and Order. The court concluded that the Plaintiffs failed to make out a case of vote dilution under § 2 of the Voting Rights Act or violations of the Fourteenth

and Fifteenth Amendments.[13] With respect to their § 2 claim, the court found (1) that District One constituted an "influence district" impermissible as a remedy under § 2 of the Act, and (2) that the illustrative plan did not constitute a permissible § 2 remedy because its 8.6% overall deviation did not comport with the one-person, one-vote requirement of the Fourteenth Amendment.

The Clerk of the District Court entered judgment pursuant to the court's Opinion and Order on August 30, 2004. The Plaintiffs thereafter moved the court to alter or amend its judgment pursuant to Federal Rule of Civil Procedure 59(e), questioning the court's findings regarding their § 2 remedy. They emphasized a point the court had not addressed: the possibility that cross-over votes by whites and Hispanics could enable African Americans to elect their candidates of choice. In their motion, the Plaintiffs cited a regression analysis that accounted for the Hispanic

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[13] The district court found no evidence of either a discriminatory purpose or discriminatory results in the enactment or operation of election procedures in Glades County, and therefore, denied the Plaintiffs' claim under the Fourteenth Amendment. Furthermore, the district court noted that in the Eleventh Circuit, vote dilution is not a cognizable claim under the Fifteenth Amendment. *See Osburn v. Cox,* 369 F.3d 1283, 1288 (11th Cir.2004) ("The Supreme Court has recognized that the Fifteenth Amendment protects the right to register and to vote, but it has never held or even suggested that vote dilution violates the Fifteenth Amendment.") (quoting *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 334 n. 3, 120 S.Ct. 866, 875 n. 3, 145 L.Ed.2d 845 (2000)).

vote,[14] in which Dr. Cole concluded that African American and Hispanic voters are politically cohesive. According to that analysis, an estimated 74% of African American and Hispanic voters combined voted for the African American candidate in the 1998 Democratic Primary for School Board District Four, in contrast with the 15% of non-Hispanic, non-African American voters who voted for the African American candidate.

The district court denied the Plaintiffs' Rule 59(e) motion, concluding that the Plaintiffs failed to establish any clear error in the court's decision, or that manifest injustice would result. This appeal followed.

II.

In this appeal, the Plaintiffs do not challenge the district court's disposition of their constitutional claims. Instead, they limit their appeal to the court's denial of their claim under § 2 of the Voting Rights Act. In relevant part, the Act declares:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right

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[14] The regression analysis that accounted for Hispanic voters concerned only the 1998 Democratic Primary for School Board District Four, the election in which plaintiff Billie Thompson participated.

> of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to . . . election in the State . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

Under § 2, vote dilution occurs where "an election practice results in the dilution of minority voting strength and, thus, impairs a minority's ability to elect the representative of its choice." *Burton v. City of Belle Glade,* 178 F.3d 1175, 1198 (11th Cir.1999). In *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court articulated three threshold requirements for Plaintiffs seeking

relief for vote dilution under § 2 of the Act: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the group must be politically cohesive; and (3) the white majority must vote sufficiently as a bloc "usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S.Ct. at 2766-67. The first of these requirements relates to whether a viable remedy exists; the second and third requirements relate to whether issues of race or color are driving election results. *Nipper v. Smith,* 39 F.3d 1494, 1510-11 (11th Cir.1994).

Although necessary, satisfying the three *Gingles* requirements is not, by itself, sufficient to establish vote dilution; § 2 further requires that the "totality of the circumstances" substantiates that a minority group possessed less relative opportunity to elect candidates of its choice. *League of United Latin American Citizens v. Perry,* ___ U.S. ___, 126 S.Ct. 2594, 2614, 165 L.Ed.2d 609 (2006). However, "it would be only the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of circumstances." *NAACP v. City of Niagara,* 65 F.3d 1002, 1019 n. 21 (2d Cir.1995).

Under a totality of the circumstances analysis, we now consistently turn to the Senate Report on the 1982 amendments to the Act, which names several factors that might be relevant to a vote dilution claim. These factors include:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 44-45, 106 S.Ct. 2752 (citing S.Rep. No. 97-417 (1982), U.S.Code Cong. & Admin.News 1982, p. 177). These Senate factors are "neither comprehensive nor exclusive," *id.* at 45, 106 S.Ct. 2752, but each of these factors points to election methods that may converge with social and historical factors to dilute the minority vote, *Nipper,* 39 F.3d at 1512.

In its dispositive order of August 27, 2004, the district court found that the Plaintiffs failed to satisfy the first *Gingles* requirement for a viable § 2 remedy,

but satisfied the second and third *Gingles* requirements. Despite its belief that the Plaintiffs' failed to surmount the threshold hurdle established by *Gingles,* "[f]or the sake of completeness," the court proceeded to undertake a totality of the circumstances analysis. In so doing, the court determined that the Plaintiffs failed to meet their burden of showing that at-large elections deprived African Americans of an equal opportunity to elect candidates of their choice.

We review a district court's findings of § 2 vote dilution for clear error. Fed.R.Civ.P. 52(a);[15] *Gingles,* 478 U.S. at 79, 106 S.Ct. at 2781; *Johnson v. Hamrick,* 296 F.3d 1065, 1074 (11th Cir.2002); *Negron v. City of Miami Beach,* 113 F.3d 1563, 1566 (11th Cir.1997). The "clearly erroneous" standard of review appropriately affords substantial deference to the district court. "Deference is afforded the district court's findings due to the court's special vantage point and ability to conduct an intensely local appraisal of the design and impact of a voting system." *Hamrick,* 296 F.3d at 1074 (quoting *Negron,* 113 F.3d at 1565). Despite the interpretative latitude granted the district court, however, review for clear error "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called

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[15] "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed.R.Civ.P. 52(a).

mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gingles,* 478 U.S. at 79, 106 S.Ct. at 2781 (quoting *Bose Corp. v. Consumers Union,* 466 U.S. 485, 501, 104 S.Ct. 1949, 1960, 80 L.Ed.2d 502 (1984)).

In vote dilution cases, we require a district court to explain *with particularity* both the reasons for its ultimate decision as well as its subsidiary findings of fact. *Solomon v. Liberty County Commissioners,* 221 F.3d 1218, 1227-28 (11th Cir.2000).

III.

Having set out the legal framework for this litigation, we turn to the questions presented in this appeal. We consider first whether the district court erred in finding the Plaintiffs' proposed plan an insufficient § 2 remedy under the first *Gingles* requirement for a minority group to be "sufficiently large and geographically compact to constitute a majority in a single-member district,"[16] and then ask whether the court erred in concluding that the

[16] We need not address the district court's discussion of the second and third *Gingles* requirements, because the court found that the Plaintiffs satisfied both, and the Plaintiffs raise no question on appeal regarding either requirement.

totality of the circumstances did not support a vote dilution claim.[17]

A.

In ruling against the Plaintiffs, the district court declared that "[n]othing in the record suggests voter registrations, voting rates, or voter practices which would give real-world meaning to the statistically sufficient district. The court finds the proposed District 1 is in reality only an influence district." We conclude that the district court erred in finding no § 2 vote dilution remedy under the first *Gingles* requirement where the Plaintiffs' remedial district carried a 50.23% voting age African American majority.

Notwithstanding that blacks constitute at least a 50.23% majority in the proposed District 1, the district court found that the Plaintiffs did not meet the first condition of *Gingles*, that the minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct.

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[17] Plaintiffs also contend that the district court clearly erred in finding that the 8.6% standard deviation within the illustrative plan constituted more than *de minimis* deviation under the one-person, one-vote principle of the Fourteenth Amendment, and therefore, the plan failed to satisfy the first *Gingles* requirement for a viable § 2 remedy. The standard deviation finding is not dispositive for the district court's conclusion that the Plaintiffs failed to establish an appropriate remedy, however, and we therefore decline to address the issue here.

2752, 92 L.Ed.2d 25 (1986). The district court did not cite any support for the conclusion that a numerically majority-minority district is a mere "influence district." Indeed, the concept of an "influence district" is directly at odds with a district in which the minority group constitutes a majority. A majority is a majority, by however small a margin, and every other court addressing the question has held a 50% numerical majority sufficient. *See, e.g., Valdespino v. Alamo Heights Indep. Sch. Dist.,* 168 F.3d 848, 852-53 (5th Cir.1999) (utilizing a 50% bright line rule); *Cousin v. Sundquist,* 145 F.3d 818, 828-29 (6th Cir.1998) (same); *Parker v. Ohio,* 263 F.Supp.2d 1100, 1104-05 (S.D.Ohio) (three-judge court) (same), *aff'd mem.,*540 U.S. 1013, 124 S.Ct. 574, 157 L.Ed.2d 426 (2003).

The district court dismissed the clear numerical majority by claiming that in order to be a viable majority with the ability to elect, it must be assumed that "every voting-age African American would have to be registered to vote, actually vote, and vote for the same person." In actuality, however, the court's conclusion is premised on several untenable assumptions; namely, that: (1) while not every black person would be registered and would vote, every white person would, in fact, be registered and would vote, and (2) all white voters would, in fact, vote for the same person and none would vote for the black

minority's candidate of choice. These assumptions are not supported by any evidence in the record.[18]

The proposed District 1 is composed of approximately 50.23% non-Hispanic black voters, 15.23% Hispanic voters, and approximately 33% white voters. For the district court to conclude that white voters would consistently defeat the black majority's candidate, the district court would have to assume that a population of approximately 33% white voters would turn out in sufficient force to defeat the candidate preferred by the 50.23% of the voting population which is black. No record evidence was introduced regarding the rates of turnout of black and white voters in Glades County. Nevertheless, without any support, the district court's analysis assumes that a greater percentage of black voters than white voters would stay home on election day.

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[18] The district court also erred in its determination that District 1 would contain only a 50.23% majority because it counted as "black" only non-Hispanic blacks, omitting persons who self-identified on the 2000 Census as both black and Hispanic. In reality, then, there may be significantly more than a 50.23% black majority in District 1. In *Georgia v. Ashcroft*, 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003), the Supreme Court explained that in cases where the dilution of black votes is at issue, anyone who checked off black, even if they checked off some other category also, should be counted as black. *Id.* at 473 n. 1, 123 S.Ct. 2498. The district court's legal conclusion that District 1 was majority-minority by too small a margin rested on clearly erroneous factual assumptions about who constituted the relevant minority.

Assuming an *equal* rate of turnout following the institution of the Plaintiffs' proposed remedy – given the lack of record evidence as to black versus white turnout in Glades County – the fact that more than 50% of the voters in District 1 are black – even by a small margin – means that the district is majority-minority, particularly relative to the proposed 33% white minority. Never before in an assessment of a proposed majority-minority district has a court required the plaintiff to prove that more minorities would *actually vote.*[19] This conjecture is clearly erroneous.

The second assumption on which the district court ruled that the numerical majority would be unable to elect a candidate is likewise erroneous because it assumes that all white voters would vote as a bloc to defeat the black minority's candidate of choice. The Plaintiffs introduced undisputed record evidence of consistent white crossover voting in Glades County of 19.2%. The district court stated that it found credible the Plaintiffs' expert testimony

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[19] The Supreme Court's recent analysis in *Perry* that a district with a bare Latino majority failed to satisfy *Gingles* is inapplicable because the Supreme Court's conclusion that many of the Latinos were not citizens eligible to vote is different from the district court's conclusion here that eligible voters might not turn out. *See* 126 S.Ct. at 2616. There is a crucial distinction between a district with a majority of *eligible* minority voters and a district that is only majority minority because non-citizens are included in the count of the minority population. There is no dispute in this case that District 1 constitutes the former, not the latter.

regarding white crossover voting of 19.2%. Although this crossover percentage was not significant enough to disprove the existence of an effective white bloc vote which presently defeats the blacks' candidate of choice (i.e., the second *Gingles* requirement), the crossover vote nevertheless should have been statistically significant in determining the sufficiency of the black minority's ability to elect in District 1.[20] *See Sanchez v. Colorado,* 97 F.3d 1303, 1319 (10th Cir.1996) ("*Gingles,* however, doesn't require an absolute monolith in the Anglo . . . bloc vote and recognizes the existence and role of white crossover voting. It does ask, though, whether as a practical

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[20] The third *Gingles* prong does not preclude courts from considering vote dilution claims for coalition districts. The Court in *Gingles* specifically considered white crossover voting and found prong three still satisfied as long as "a white bloc vote . . . normally will defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56, 106 S.Ct. 2752. In other words, it is possible for there to be white crossover voting that is insufficiently substantial to defeat the Plaintiffs' assertion of white bloc voting under the second *Gingles* requirement but that is nevertheless significant enough to establish an "ability to elect" district under the first *Gingles* requirement. *Cf. Cane v. Worcester County,* 35 F.3d 921, 926 (4th Cir.1994) (finding average 19% white crossover vote insufficient to salvage at-large, one-on-one election scheme under the facts of that case), *cert. denied,* 513 U.S. 1148, 115 S.Ct. 1097, 130 L.Ed.2d 1065 (1995). "If blacks constitute just under fifty percent of the population and a small fraction of white voters are willing to cross over, voting is still clearly racially polarized, yet black voters can prevail in a coalition district." Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation,* 117 HARV. L.REV. 2598, 2605 (2004).

matter, whites usually vote as a bloc to defeat the minority-preferred candidate."). Yet in this case, the district court failed to take into account the undisputed 19.2% crossover voting rate when determining that the margin of black majority in District 1 would be too narrow to constitute an "ability to elect" district.

The Supreme Court described vote dilution in *Gingles* as existing where a white voting bloc defeats not only the black minority but "the combined strength of minority support *plus white 'crossover' votes.*" 478 U.S. at 56, 106 S.Ct. 2752; *see also id.* at 89 n. 1, 106 S.Ct. 2752 (O'Connor, J., concurring) (explaining that a minority too small to constitute a majority in a single-member district would have an interest protected by Section 2 if it can show that white support would probably enable the election of the candidates its members prefer). Again in *Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993), the Court noted that the first *Gingles* factor could be modified when analyzing an influence dilution claim when the plaintiffs establish a district with what is technically less than a majority of minority voters, but "the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority," *id.* at 158, 113 S.Ct. 1149.

Most recently, in *Georgia v. Ashcroft,* 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003), the Supreme Court adopted the term "coalition districts" to refer to districts in which minority-preferred

candidates can be elected with the assistance of white crossover voters. *Id.* at 481, 123 S.Ct. 2498. The Court specifically contrasted coalition districts with influence districts, defining an influence district as one in which minority voters have some form of political "influence" *notwithstanding* that they are unable to elect their preferred candidates even with white crossover support. *Id.* The Court nevertheless held that coalition districts are not retrogressive for purposes of the Voting Rights Act, a proposition with which even the dissenting Justices agreed. *Id.* at 483-84, 492, 123 S.Ct. 2498 (Souter, J., dissenting). In this case, the district court erroneously ignored the 19.2% white crossover votes when it determined that the margin of black majority was insufficient to constitute a district with the ability to elect.

Given the evidence that District 1 contained a numerical black majority and that at least some white voters in District 1 would vote cohesively with black voters, the district court clearly erred. In District 1, the black majority would be able to elect the candidate of its choosing, not only because the black majority would constitute more than 50% of the population, but also because the black majority would enjoy support from white crossover votes. For these reasons, we reverse the district court's finding that the first *Gingles* factor was not met and remand for findings consistent with that conclusion.

B.

As noted above, in conducting a totality of the circumstances analysis, we turn to several factors delineated in the Senate Report on the 1982 amendments to the Act. *Gingles,* 478 U.S. at 44-45, 106 S.Ct. 2752 (citing S.Rep. No. 97-417 (1982)). An error in the threshold analysis does not *necessarily* require reversal of the ultimate totality of circumstances decision. *City of Niagara,* 65 F.3d at 1002 (affirming in spite of clear error on a threshold factor). However, as *City of Niagara Falls*[21] noted, "it would be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must *explain with particularity* why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a

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[21] In *City of Niagara Falls,* the district court considered a challenge to an at-large voting system for the seven-member city council. The district court found no history of official discrimination, no unusual voting practices or procedures, no racial appeals in campaigning, some success for minority candidates in elections, and responsiveness on the part of public officials to minority needs, and no tenuous policies underlaying electoral practices. These factors outweighed racial polarization, the socioeconomic disadvantages of the African American community, and the possible dilutive effect of staggered elections. The court affirmed only after closely examining the district court's *detailed* totality of the circumstances analysis. 65 F.3d at 1019-24.

politically cohesive minority group is not violative of § 2 of the Voting Rights Act." *Id.* at 1019 n. 21 (quoting *Jenkins v. Red Clay Consol. School. Dist.,* 4 F.3d 1103, 1135 (3d Cir.1993)) (emphasis added); *see also Solomon v. Liberty County,* 221 F.3d 1218, 1227-28 (11th Cir.2000) (en banc) (requiring district courts to explain their totality of circumstances reasoning "with particularity").

In the present case, the district court concluded that the totality of the circumstances failed to support the Plaintiffs' vote dilution claim, but did not explain its totality of circumstances analysis with particularity. The district court did consider each of the nine factors set forth by *Gingles,* 478 U.S. at 36-37, 106 S.Ct. 2752. The court found that the at-large voting system for the school board, and perhaps for the county commission, was enacted to dilute the African American vote; that voting was racially polarized; that the majority vote requirement "can operate in a manner that dilutes the minority African American vote"; and that African Americans suffered socio-economic disadvantages. The court nevertheless rejected Plaintiffs' § 2 claim, on grounds that two African American candidates have been elected to public office; that African Americans can overcome socio-economic obstacles to political participation by attending political rallies and community meetings; that no overt or implicit racial appeals were made in campaigns; that elected officials have been responsive to the needs of the African American community; and that the policies underlying the electoral system were

not tenuous. Some aspects of the court's analysis are conclusory and open to serious doubt.

With regard to minority success in elections, the district court cited the elections of Charles Hall to the county commission in 1976 and of Beamon Rich to the Moore Haven city council in 1988. However, Rich was not elected under the at-large majority voting system at issue here. Instead, he ran in a city council election with no majority vote requirement and won a seat with only 16% of the vote in a city where 18% of the population was African American. The example of Rich supports the inference that African American voting power, which is concentrated in Moore Haven, has been diluted by the at-large voting system. The district court's contrary inference is clearly erroneous. Moreover, Hall's utility as an example of success is undermined by the fact that he was elected when the eligible African American voting population was nearly double what it is today. Coupled with racially polarized voting, the lack of minority success since Hall's election tends to demonstrate dilution. Another probative fact – which the district court did not consider – was that only three African Americans have run for public office in Glades County history. Given a history of discrimination and socio-economic disadvantage, the paucity of minority candidates may not be completely fortuitous. The district court's strained analysis of minority candidacies is particularly troubling because the Supreme Court has identified the extent to which they succeed as one of the two most important factors in vote dilution analysis

(the other being racially polarized voting). *Gingles,* 478 U.S. at 48 n. 15, 106 S.Ct. 2752.

The district court's conclusion that African Americans faced no obstacles to political participation is also inadequately reasoned. The court found that African Americans suffered significant socio-economic disadvantages. In determining the electoral effect of that disadvantage, the court confined its analysis to transportation for political candidates. The court noted that although an African American candidate was less likely to own automobiles, she could still campaign by attending community meetings and political rallies. The court did not expressly consider other aspects of political participation, such as voter registration, voter turnabout, political connections, and participation in political parties and other political organizations. *See Solomon,* 221 F.3d at 1222 (considering these factors). Those factors, not automobile ownership, are ones that usually come to mind in considering obstacles to political participation. *See id.*; *see also City of Niagara Falls,* 65 F.3d at 1021 (analyzing voter registration and turnout). It is difficult to reconcile the failure to consider those factors, given that the district court had implicitly assumed lower minority voter turnout to find that a 50.23% minority-majority was insufficient in the threshold inquiry. A fuller assessment of obstacles to political participation is warranted.

Elsewhere, the district court made conclusory findings. For example, the district court stated that "the weight of the convincing evidence establishes a

responsiveness to the minority community," but did not describe any of that evidence. The district court found that the policies underlying the voting system were not tenuous, but did not discuss what those policies were. *Cf. Solomon,* 221 F.3d at 1234 (policy driven by citizen's reform movement); *NAACP v. Fordice,* 252 F.3d 361, 372-73 (5th Cir.2001) (policy of reducing operational costs). Even if these conclusions are not clearly erroneous, the district court's analysis should have been more developed.

When compared with the detailed district court findings affirmed in *City of Niagara Falls* and *Solomon,* it is apparent that the district court here failed to explain its reasoning with particularity to facilitate informed appellate review. *See, e.g., Solomon v. Liberty County,* 957 F.Supp. 1522, 1557-72 (N.D.Fla.1997). We thus remand this case for reconsideration of the totality of circumstances in light of the district court's error in the threshold *Gingles* inquiry. *See Houston v. Lafayette County,* 56 F.3d 606, 613 (5th Cir.1995) (remanding after finding error in threshold inquiry); *Jenkins,* 4 F.3d at 1135 (same).

IV.

The district court clearly erred in finding that District One of the Plaintiffs' illustrative plan constitutes an influence district. Thus, the court committed error in concluding that the Plaintiffs failed to establish a § 2 remedy. Furthermore, the court failed to explain with sufficient particularity that the totality

of the circumstances weakens the Plaintiffs' vote dilution claim. In making those determinations, the court did not properly apply the relevant legal principles and grounded its findings in inaccurate perceptions of the law. We therefore reverse the district court's holding that the Plaintiffs' proposed remedial plan is insufficient under the first prong of the Gingles test and remand to the district court for reconsideration of the totality of the circumstances test.

REVERSED AND REMANDED.

TJOFLAT, Circuit Judge, dissenting:

In finding a § 2 remedy appropriate for Glades County, Florida, the majority expands our circuit's Voting Rights Act (or "Act") jurisprudence into unanticipated territory. Because I believe that the majority's two holdings shift our circuit precedent afield, I respectfully dissent.

The majority first holds that the district court clearly erred in finding that the plaintiffs failed to satisfy the threshold *Gingles* requirement for a viable remedy, and second, concludes that the district court clearly erred in failing to state with particularity its reasons for finding that the totality of the circumstances did not support vote dilution. I address each of these holdings in turn.

I.

The majority's conclusion that the district court erred in its analysis of the first *Gingles* requirement turns on the district court's finding that the illustrative district prepared by the plaintiffs constituted an "influence district" – insufficient as a § 2 remedy – where a bare 50.23% majority of the voting age population would be African American. Under *Gingles,* a viable § 2 remedy requires a minority population to be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles,* 478 U.S. 30, 50, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986); *see also Negron v. City of Miami Beach, Florida,* 113 F.3d 1563, 1567 (11th Cir.1997) (finding the first *Gingles* requirement satisfied where Hispanic plaintiffs would constitute 63.77%, 62.24%, and 56.80% majorities in three remedial single-member districts). In rejecting the district court's factual finding, the majority relies on two premises: (1) even the barest of majorities can satisfy the *Gingles* threshold requirement; and (2) crossover votes may be included to satisfy that requirement. The former premise places our court in the unpalatable position of mechanically trumping judicial fact-finding on a numerical bright-line basis, and the latter prematurely resolves an issue on which both our circuit and the Supreme Court have recently and purposefully abstained.

A.

Although the language of the *Gingles* Court suggests that a pure mathematical majority satisfies the first requirement, the Court also articulated that the policy rationale of the first requirement is to afford minority groups an opportunity to elect preferred candidates: "Unless minority voters possess the *potential to elect* representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles,* 478 U.S. at 51 n. 17, 106 S.Ct. at 2767 n. 17. Common sense militates against conferring judicial safe harbor as a matter of law where a remedial plan achieves a majority-minority district by only a handful of individuals. I submit that the first *Gingles* requirement cannot be read as satisfied where a district court finds that a slim majority would not give a minority population the "potential to elect" representatives of their choice. In effect, a bare mathematical majority is no shibboleth for a proper § 2 remedy in vote dilution cases.

The evolving law regarding "influence districts" counsels against adopting bare numerical majorities as the mark of a viable § 2 remedy. In *Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993), the Supreme Court suggested that the first *Gingles* requirement might need to be "modified or eliminated" if minority plaintiffs proved that they could harness *significant* political influence within a given electorate while constituting less than 50% of the relevant voting age population. *Id.* at 156-60, 113

S.Ct. at 1157-58 (emphasis added). No definite rule emerged, however, and the Court has deferred the question for well over a decade.[1] Recently, in *League of United Latin American Citizens v. Perry*,[2] ___ U.S. ___, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006), a plurality of the Court[3] continued to punt on the issue,

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[1] The Supreme Court declined to decide the issue of whether "influence districts" could constitute a proper § 2 remedy under the first *Gingles* requirement in, *e.g.*, *De Grandy*, 512 U.S. at 1008-09, 114 S.Ct. at 2656; *Voinovich*, 507 U.S. at 154, 113 S.Ct. at 1149; *Growe v. Emison*, 507 U.S. 25, 41 n. 5, 113 S.Ct. 1075, 1084 n. 5, 122 L.Ed.2d 388 (1993); *Gingles*, 478 U.S. at 46-47 n. 12, 106 S.Ct. at 2764 n. 12.

[2] Justice Kennedy wrote the *Perry* opinion, and delivered the opinion of the Court with respect to Parts II-A (constitutionality of a partisan gerrymander) and III (vote dilution claim of Hispanics); a plurality opinion with respect to Part I (factual and procedural history) and Part IV (vote dilution claim of African Americans) (joined by the Chief Justice and Justice Alito); an opinion with respect to Parts II-B (political ramifications of congressional redistricting) and II-C (constitutionality of partisan gerrymander); and a plurality opinion with respect to II-D (constitutionality of mid-decade redistricting) (joined by Justices Souter and Ginsburg).

[3] With regard to the influence district issue, Chief Justice Roberts and Justice Alito joined Justice Kennedy in deeming no § 2 remedy to be available where African-Americans were 25.7% of the citizen voting age population in District 24, the district at issue. The plaintiffs in the case contended that African Americans nonetheless had control ("influence") over the district, and that a recent redistricting plan diluted the African American vote by removing District 24. *Perry*, 126 S.Ct. at 2624 (plurality opinion). For his part, Justice Souter argued that *Perry* ought to have been the case by which the Court resolved the confusion surrounding influence districts in the Court's vote dilution jurisprudence. *See id.* at 2648 n. 1 ("Although both the plurality

(Continued on following page)

merely assuming for the purposes of that particular litigation that it would be possible to state a § 2 claim for a racial group that constituted less than 50% of the relevant voting age population. *Id.* at 2624 (plurality opinion). Ultimately, on the facts of *Perry,* the Court declined to find the proposed influence district to be an adequate § 2 remedy. *See id.* at 2625 ("That African-Americans had influence in the district . . . does not suffice to state a § 2 claim in these cases. The opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates. . . .").

Despite not deciding the issue, the *Perry* plurality echoed what was already law in our own circuit. In *Dillard v. Baldwin County Commissioners,* 376 F.3d 1260 (11th Cir.2004), we held that African American citizens in Alabama had no vote dilution remedy where they constituted less than 10% of the electorate at issue and could not comprise a majority

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today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, . . . the day has come to answer it."). Justice Souter agreed with the plaintiffs' argument that influence districts ought to be viable as a § 2 remedy under the first *Gingles* requirement by way of analogy to section 5 of the Act, which applies where a political change has the purpose or effect of "denying or abridging the right to vote," 42 U.S.C. § 1973(c). *Id.* at 2648, 2648 n. 3. Specifically, he would find the first *Gingles* requirement satisfied where a minority population was a majority in the electorate's primary or through crossover voting. *Id.* at 2648.

of the voting age population in any remedial district. *Id.* at 1267. The plaintiff in *Dillard* sought to persuade the court that numerically small minority groups could create "influence districts" that would suffice under the first *Gingles* requirement because minority voters would "play a substantial, although not decisive, role in the electoral process." *Id.* (quoting *Georgia v. Ashcroft,* 539 U.S. 461, 482, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003)). However, we rejected that argument in *Dillard.* In declining to advance influence districts as a cognizable remedy under § 2, the *Dillard* panel observed that the facts of the case established no form of relief that could "empower the protected minority group with a *meaningful opportunity* to elect the candidate of its choice." *Id.* at 1262 (emphasis added). Where a minority group carries a majority by only a slim margin, a factual possibility exists that the district's minority population could "influence" but not have a "meaningful opportunity" to determine the outcome of elections. *See Perry,* 126 S.Ct. at 2616, 126 S.Ct. 2594 ("Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a *hollow sense,* for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates.").

In the instant case, the plaintiffs argue that the district court erred in deeming District 1 of their illustrative plan an impermissible "influence district." The rub in this case in that the district court

extended the definition of an influence district beyond plaintiffs who could not form a majority-minority district to the situation at hand, where the plaintiffs have created a majority, but only by a trace number of individuals. African Americans comprise only 50.23% (775 persons) of the voting age population in the proposed District 1. Moreover, given the already-low population of African Americans in Glades County, the plaintiffs presented an illustrative district with only the slimmest of numerical majorities – a mere five persons.[4] However, although the question of

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[4] If illustrative District 1 were to replace five of the African Americans with five white voting age persons, the African American voting age population would drop to 49.9%. In a footnote aside, the majority also finds that "the district court also erred in its determination that District 1 would contain only a 50.23% majority because it counted as 'black' only non-Hispanic blacks, omitting persons who self-identified on the 2000 Census as both black and Hispanic." With that in mind, the majority posits that "there may be significantly more than a 50.23% black majority in District 1." The 2000 Census, however, suggests that the majority's line of argument may rest on a red herring. The 50.23% majority in the proposed District 1 was calculated by William S. Cooper, the *plaintiffs'* expert witness, who prepared statistics under the definition of African Americans as "non-Hispanic blacks." Although the record does not indicate how many individuals – if any – would self-identify as both Hispanic and black in District 1, the 2000 Census indicates that in Glades County as a whole, there were 834 voting-age individuals who identified themselves – in whole or in part – as black, and 830 voting-age individuals who identified themselves as non-Hispanic black. As a result, there were at most four individuals county-wide who may have been excluded by the calculations presented by Cooper. I find it difficult to presume that the inclusion of any persons who may have self-identified as

(Continued on following page)

whether a bare mathematical majority can still constitute an impermissible influence district apparently raises an issue of first impression for our circuit, I find the district court's conclusion in the affirmative to be compatible with the spirit of *Gingles* and its progeny.

In support of its contention that a 50% numerical majority is sufficient, the majority cites only to cases from other circuits with distinguishable facts. In *Valdespino v. Alamo Heights Indep. Sch. Dist.,* 168 F.3d 848 (5th Cir.1999), the Fifth Circuit applied a 50% bright-line rule, but where the minority population constituted only 47.9% of the voting age population in the proposed remedial district. *Id.* at 852-53. The majority is likewise on precarious ground in relying upon *Cousin v. Sundquist,* 145 F.3d 818 (6th Cir.1998). There, the Sixth Circuit not only rejected a sub-50% influence district as an appropriate § 2 remedy, but also found a proposed remedial district deficient where the district contained, similar to the case before us, only a bare majority. *Id.* at 829 ("Even in the one district where blacks constitute a voting age population majority, their *50.3%* margin is so *razor-thin* that it does not meet the 'safe district' standards of courts that have approved race-conscious realignments in other electoral contexts."). Pointing to *Parker v. Ohio,* 263 F.Supp.2d 1100

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both black and Hispanic would have resulted in "significantly more than a 50.23% majority" in the plaintiffs' proposed remedial district.

(S.D.Oh.2003) (three-judge court), *aff'd mem.*, 540 U.S. 1013, 124 S.Ct. 574, 157 L.Ed.2d 426 (2003), furthermore, does not help the majority's case. In *Parker,* the court merely reaffirmed what our own circuit has stated in the past – that influence districts are not cognizable remedies under the Voting Rights Act. *Id.* at 1105. The cases cited by the majority only point to the conclusion that influence districts are insufficient § 2 remedies. I would not dispute that conclusion. I would only dispute a mechanical "analysis" of the first *Gingles* requirement that would automatically find a remedy in a district with a 50.0% minority voting age population but no remedy in a district with a 49.9% minority voting age population. Such inflexibility, I posit, contravenes the searching factual analysis the Supreme Court set in place in *Gingles.*

Rote application of technical requirements does not comport with the motivating concerns of the Act. Section 2 jurisprudence suggests that Congress did not intend to create pure mathematical requirements for a vote dilution claim. *See Perry,* 126 S.Ct. at 2615 ("[I]t may be possible for a citizen voting-age majority to lack real electoral opportunity."); *see also De Grandy,* 512 U.S. at 1008, 114 S.Ct. 2647 (finding the first *Gingles* condition satisfied where reasonably compact districts contained "a *sufficiently large* minority population to elect candidates of its choice") (emphasis added); *Voinovich v. Quilter,* 507 U.S. 146, 158, 113 S.Ct. 1149, 1157, 122 L.Ed.2d 500 (1993) ("Of course, the *Gingles* factors *cannot* be applied

mechanically and without regard to the nature of the claim.") (emphasis added). Although a minority group may technically constitute a statistical majority for purposes of satisfying the first *Gingles* requirement, if the group does not have a realistic chance to elect its candidates of choice, it fails to present a viable § 2 remedy. To hold otherwise would open the gateway for minority plaintiffs to glean a remedial district from a sparse population that would be a mere simulacrum of a viable remedy. *See Dillard,* 376 F.3d at 1269 ("To open the door to the inevitable flood of *marginal* § 2 claims would impose an unwarranted burden on the lower federal courts and an indefensible encroachment into the affairs of state governments.") (emphasis added). Even if a new District 1 could contain – which it cannot – the 59 remaining African Americans of voting age in Glades County, African Americans would comprise only 54.05% of the voting age population.[5] I cannot conclude that the district

[5] The 54.05% calculation (834/1,543) that would include all African Americans of voting age within a single proposed majority-minority district is itself far too generous. The geographical distribution of African Americans in Glades County precludes an easy redistricting to provide for a more substantial majority. According to the illustrative plan, District 1 is bordered by District Two and District Four. Districts Two and Four have a combined African American voting age population of 37 individuals (33 in District Two and 4 in District Four). Therefore, while still improbable, even were those 37 African American voting age individuals to live close enough to the borders of the proposed District 1 to be subsumed within a new majority-minority district, the new calculation (812/1,543) results in only a 52.62% majority voting age population for African Americans.

court erred in finding a mere five-person, 50.23% buffer majority to be simply a vestigial appendage to a legally insufficient influence district.

B.

The majority's argument seems to gainsay the validity of the plaintiffs' proposed District 1. Rather than resting the weight of their argument on the tenuous grounds of the mathematical majority, the majority, on the basis of a 19.2% *countywide* white crossover voting rate, argues that the white crossover vote *in District 1* "should have been statistically significant in determining the sufficiency of the black minority's ability to elect in District 1."

In applying the crossover vote at the threshold *Gingles* stage, the majority quietly carves out a new rule of law for this circuit. The question of whether to apply crossover voting is an issue on which both we and the Supreme Court have recently withheld decision. *Dillard,* 376 F.3d at 1269 n. 7; *see also Perry,* 126 S.Ct. at 2624.

We have yet to answer conclusively the question of whether minority plaintiffs may apply the crossover vote of a separate racial group in order to transform an influence district into a viable remedial district. We specifically declined to address the issue in the *Dillard* decision that held minority influence districts impermissible as a § 2 remedy: "We leave open the question of whether a § 2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim, i.e., a

claim where 'members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to elect representatives of their choice with support from a limited but reliable white crossover vote.'" *Dillard,* 376 F.3d at 1269 n. 7 (quoting *Rodriguez v. Pataki,* 308 F.Supp.2d 346, 376 (S.D.N.Y.2004)); *see also Perry,* 126 S.Ct. at 2624 (arguing that *if* it were possible for influence districts to be a valid § 2 remedy, the plaintiffs must show that they constitute "a sufficiently large minority to elect their candidate of choice with the assistance of crossover votes") (quoting *Voinovich,* 507 U.S. at 158, 113 S.Ct. at 1149). Given the unsettled character of the legal issue, I refuse to consider as clear error the district court's decision to decline to account for a speculative white crossover vote in District 1. *See Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (citing *United States v. Yellow Cab Co.,* 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949)).

The plaintiffs themselves, moreover, failed to raise white crossover voting at trial as a basis for the sufficiency of their proposed remedial district – as a result, the record pertaining to white crossover voting in the illustrative district is limited. It is unsurprising, therefore, that in both its order denying the plaintiffs relief after bench trial, as well as its order denying the plaintiffs' motion to alter judgment, the

district court purposefully declined to consider the white crossover vote in coalition with the African American vote in finding District 1 to be an influence district comprised of only the slimmest of literal majorities.

The majority also seems to assume that significant crossover voting would take place in the proposed remedial district. I would indulge in no such assumption. Were the court to adopt the plaintiffs' plan – replacing at-large voting with single-member district voting – white voters who might otherwise vote for an African American candidate might not be inclined to do so in light of the fact that such bloc voting could grant African Americans a disproportionate representation on the County Commission and School Board[6] and result in district representatives who would have less incentive to be responsive to white residents in the rest of the county.

I cannot conclude that the district court clearly erred in declining to account for the white crossover vote in its analysis of whether the plaintiffs satisfied the first *Gingles* requirement. Neither the evidence in the record nor the relevant case law required the court to have addressed any white residents voting as a bloc with the plaintiff African Americans.

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[6] Although African Americans represent 10% of the Glades County electorate, they seek 20% (one out of five) of the seats available on the County Commission and School Board.

II

I turn now to the majority's argument that the district court failed to set out with particularity its reasoning regarding the totality of the circumstances. Although it is certainly the case that we require a district court to state its reasoning with particularity, we have also held that where a district court possesses a correct understanding of the law, "engaged in a searching and meaningful evaluation of all the relevant evidence," and the record supports the court's findings, appellate review is satisfied. *Solomon v. Liberty County Com'rs,* 221 F.3d 1218, 1228 (11th Cir.2000) (en banc) (quoting *Southern Christian Leadership Conference v. Sessions,* 56 F.3d 1281, 1293 (11th Cir.1995) (en banc)). I believe that the district court fully met that standard.

Even assuming that the plaintiffs satisfied the first *Gingles* requirement, I would still affirm the district court because there was no error in the court's assessment of the totality of the circumstances. *NAACP v. Fordice,* 252 F.3d 361, 374 (5th Cir.2001) (affirming the district court's conclusion that no vote dilution existed where the district court found that the plaintiffs had satisfied the *Gingles* requirements, but not the totality of the circumstances test).

As the majority notes, in conducting a totality of the circumstances analysis, a court turn to several factors delineated in the Senate Report on the 1982 amendments to the Act. *Gingles,* 478 U.S. at 44-45, 106 S.Ct. 2752 (citing S.Rep. No. 97-417 (1982)). In

its 49-page order, the district court went through each of the specific factors,[7] and concluded that the totality of the circumstances failed to support the plaintiffs' vote dilution claim.

Upon reviewing the record, I cannot say that the district court clearly erred in the method of its analysis. In reaching its conclusion, the court reviewed the testimony of various experts on the racial history of Florida, particularly with regard to changes to the election process,[8] statistical analyses of Glades County voter behavior, and the background underpinning the plaintiffs' illustrative plan. *See Anderson,*

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[7] In the course of its discussion, the district court found: (1) no evidence that the ability of African Americans in Glades County to participate in the political process continued to be hindered by historical discrimination; (2) no evidence of overt appeals to race during the election process; (3) that only the majority vote requirement, and possibly the size of Glades County, might enhance the potential for discrimination against African Americans; (4) no candidate slating process in Glades County; (5) no socio-economic conditions that severely impair equal footing for African Americans in the political process; (6) no evidence of racial appeals in political campaigns; (7) "some electoral success" by African American candidates for public office; (8) responsiveness to the needs of the African American community; (9) no evidence of tenuous election practices; (10) no districts that contain a majority of minority voting age persons; and (11) that African Americans had not yet achieved representation proportional to their approximately 10% share of the countywide population.

[8] Mormino found that both the 1947 legislation adopting statewide at-large school board primaries as well as 1900 constitutional amendment adopting at-large elections for county commissioners were motivated by racially discriminatory intent.

470 U.S. at 575, 105 S.Ct. at 1512 ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); *see also De Grandy*, 512 U.S. at 1011, 114 S.Ct. 2647 ("[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts."). Moreover, the district court reviewed relevant census data, including data relating to the socio-economic disparities between Caucasian and African American households.[9] When considering the historical patterns of election for African Americans; the court noted that only three African Americans had ever sought elected office in Glades County, two of whom had made successful bids.[10] Furthermore, the court invested substantial energy in reviewing several depositions.[11] Those

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[9] The district court noted that the per capita income for African Americans in Glades County was $6,130, while the per capita income for Caucasians was $12,012. Likewise, while 39.9% of Caucasians over the age of 25 had not completed high school, the same was true for 79% of African Americans.

[10] Charles Hall was elected to the County Commission in 1976; Beamon Rich was elected to the City Council for Moore Haven in 1998, and plaintiff Billie Thompson made an unsuccessful bid for Glades County School Board in 1998.

[11] The court reviewed the depositions of: Janet Storey (School Board District 1), Catherine Baxter Peeples (School

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depositions revealed little evidence of racial discrimination or racial appeals during campaigning. Indeed, the testimony of plaintiff Billie Thompson suggests that the opposite is true: despite the vast acreage of Glades County, she campaigned in every major voting area (covering 90% of the county), attended (and was well-received) at the only political rally for the primary, and expressed the opinion that she had a "small but effective" campaign, a fact supported by her having garnered 40% of the vote countywide.

Also, the district court properly considered the special referendum held on June 5, 2001, which Dr. Steven Cole, a plaintiffs' expert, conceded did not reflect racially polarized voting. In precincts with a 90% or greater African American voting age population, only 52% voted in favor of single-member districts. We have previously considered similar referenda as relevant to the question of whether policies underlying electoral procedures are tenuous, as well as the responsiveness of elected officials to the unique needs of a minority population. *See Solomon v. Liberty County Commissioners,* 221 F.3d 1218, 1234 (11th Cir.2000) (noting that a majority of voters in Liberty County, including 60% of African Americans,

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Board District 2), Tom Gaskins (School Board District 3), Mike Pressley (School Board District 4), Susan T. Shriveler (School Board District 5), K.S. Jones (County Commission District 1), Alvin Ward (County Commission District 2), Franklin Simmons (County Commission District 4), and Holly Whiddon Green (Supervisor of Elections).

voted for at-large elections and against single-member districts for school board elections); *id.* ("Obviously, the fact that black *and* white voters in Liberty County voted overwhelmingly against single-member districts, tends to undercut any suggestion that the continued policy of maintaining at-large elections is somehow discriminatory or otherwise tenuous.") (quoting *Solomon v. Liberty County, Florida,* 957 F.Supp. 1522, 1568 (N.D.Fla.1997)).

The Supreme Court, furthermore, has agreed that proportionality[12] is a relevant consideration under a § 2(b) totality of the circumstances analysis. *Perry,* 126 S.Ct. at 2614; *De Grandy,* 512 U.S at 1006-07, 114 S.Ct. 2647. Case law subsequent to *Gingles* counsels attention to "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *De Grandy,* 512 U.S. at

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[12] The question of whether the number of majority-minority districts is "roughly proportional" to a minority group's share of the overall population is distinct from the question of whether a minority group is guaranteed proportionate representation. The Act itself resolves the latter question, noting that "nothing in this section establishes a *right* to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (emphasis added). Although the Act precludes any formal guarantee of electoral success to a minority group, § 2 permits an examination of proportionality as an appropriate inquiry into equality of opportunity. *See De Grandy,* 512 U.S. at 1015 n. 11, 114 S.Ct. 2647 ("[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.").

1006-07, 114 S.Ct. 2647; *see Baird v. Consolidated City of Indianapolis,* 976 F.2d 357, 358 (7th Cir.1992) ("The district court's analysis took into consideration the fact that the African-American voting age population, 10% of the relevant voting population (and apparently on a diminishing trend), ought to have the opportunity to elect effectively 20% of the School Board and County Commission (one of the five elected members for each group).[13] Here, 10% of the electorate seeks one out of each of the five seats available on the County Commission and School Board – political representation a full 100% above its percentage among the voting age population of Glades County.") *See Perry,* 126 S.Ct. at 2662 (C.J. Roberts, dissenting) ("Latino voters enjoy effective political power 46% above their numerical strength, or, even disregarding District 25 as an opportunity district, 24% above their numerical strength. . . . Surely these figures do not suggest a denial of equal *opportunity* to *participate* in the political process."); *De Grandy,* 512 U.S. at 1017 n. 13, 114 S.Ct. at 2660 n. 13 ("When 40 percent of the population determines electoral outcomes in 7 out of 10 districts, the minority group can be said to enjoy

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[13] We note that the Supreme Court has made clear that a federal court cannot increase the size of elected bodies as a part of remedying a § 2 violation. *See Holder v. Hall,* 512 U.S. 874, 881, 114 S.Ct. 2581, 2586, 129 L.Ed.2d 687 (1994) ("There is no principled reason why one size [of an elected governing body] should be picked over another as the benchmark for [determining whether vote dilution exists]."); *Nipper v. Smith,* 39 F.3d 1494, 1532 (11th Cir.1994) (same).

effective political power 75 percent above its numerical strength."). Indeed, the facts of the instant case are difficult to massage into a vote dilution claim where a 10.1% countywide voting age population of African Americans would seek 20%, respectively, of the five-seat County Commission and School Board. Ultimately, the legislative history of the Voting Rights Act counsels that the purpose of a § 2 remedy is not to ensure a windfall for a minority population. *See De Grandy,* 512 U.S. at 1017, 114 S.Ct. at 2660 ("One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. However prejudiced a society might be, it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power 75 percent above its numerical strength indicates a denial of equal participation in the political process. Failure to maximize cannot be the measure of § 2."). Upon review of the record, I cannot find clear error in the district court's determination that the totality of the circumstances does not support a vote dilution claim in Glades County.[14]

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[14] The majority would remand this case for reconsideration of the totality of the circumstances in light of its holding that the district court erred in the threshold *Gingles* inquiry. If we are to accept the majority's holding, however, that the district court ought to have applied the Hispanic crossover vote to the African American vote, we are confronted by the awkward question of whether the Hispanics ought not be considered in the totality of the circumstances analysis. Because the plaintiffs failed to

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III.

For the aforementioned reasons, I would conclude that the district court did not clearly err in finding that District 1 of the plaintiffs' illustrative plan constituted an influence district insufficient as a remedy under § 2 of the Voting Rights Act. I would likewise conclude that the court did not clearly err in finding that the totality of the circumstances did not support the plaintiffs' vote dilution claim. In making those determinations, the court properly applied the relevant legal principles and grounded its findings in an accurate understanding of the law. I therefore dissent.

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provide expert testimony with regard to the Hispanic population, such a question would prove difficult to weigh.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BILLIE THOMPSON and PATRICIA BROWN,

Plaintiffs,

vs.

GLADES COUNTY BOARD OF COUNTY COMMISSIONERS, GLADES COUNTY SCHOOL BOARD, and HOLLY WHIDDEN GREEN, in her official capacity as GLADES COUNTY SUPERVISOR OF ELECTIONS,

Defendants.

Case No. 2:00-cv-212-FtM-29DNF

ORDER

This matter comes before the Court on Plaintiffs' Motion To Alter or Amend Judgment (Doc. #71) and Memorandum in Support (Doc. #72) filed on September 14, 2004. Defendants filed a Response (Doc. #74) and Memorandum in Opposition (Doc. #75) on November 22, 2004. Plaintiffs move pursuant to Fed. R. Civ. P. 59(e) to alter or amend the judgment entered in this case on August 30, 2004.

I.

Reconsideration of a court's previous order is an extraordinary remedy and, thus, is a power which

should be used sparingly. *American Ass'n of People with Disabilities v. Hood,* 278 F. Supp. 2d 1337, 1339 (M.D. Fla. 2003), citing *Taylor Woodrow Constr. Corp. v. Sarasota/Manatee Airport Auth.,* 814 F. Supp. 1072, 1072-73 (M.D. Fla. 1993). Under Rule 59(e), courts have "delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; (3) the need to correct clear error or prevent manifest injustice." *Sussman v. Salem, Saxon & Nielsen, P.A.,* 153 F.R.D. 689, 694 (M.D. Fla. 1994). Plaintiffs raise only the third ground in their motion.

"A motion for reconsideration should raise new issues, not merely readdress issues litigated previously." *PaineWebber Income Props. Three Ltd. P'ship v. Mobil Oil Corp.,* 902 F. Supp. 1514, 1521 (M.D. Fla. 1995). The motion must set forth facts or law of a strongly convincing nature to demonstrate to the court the reason to reverse its prior decision. *Taylor Woodrow,* 814 F. Supp. at 1073; *PaineWebber,* 902 F. Supp. at 1521. "When issues have been carefully considered and decisions rendered, the only reason which should commend reconsideration of that decision is a change in the factual or legal underpinning upon which the decision was based. *Taylor Woodrow,* 814 F. Supp. at 1072-73.

A motion for reconsideration does not provide an opportunity to simply reargue – or argue for the first time – an issue the Court has once determined. Court opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's

pleasure." *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). "The burden is upon the movant to establish the extraordinary circumstances supporting reconsideration." *Mannings v. School Bd. of Hillsborough County, Fla.*, 149 F.R.D. 235, 235 (M.D. Fla. 1993). Unless the movant's arguments fall into the limited categories outlined above, a motion to reconsider must be denied.

II.

In this case, plaintiffs challenged the at-large method of electing the Glades County Board of County Commission and the Glades County School Board under section 2 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments of the United States Constitution. Following a two-day bench trial, the Court issued an Opinion and Order in which it concluded, inter alia, that plaintiffs' claim under section 2 of the Voting Rights Act failed because plaintiffs failed to establish the existence of a viable and proper remedy as required under *Thornburg v. Gingles*, 478 U.S. 30 (1986) and its progeny. (Doc. #69, pp. 30-38). Plaintiffs contend that this holding was "incorrect both as to the evidence in this record and the law." (Doc. #71, p. 1).

After reviewing plaintiffs' motion and memorandum in support, the Court concludes that plaintiffs have not shown that they are entitled to the extraordinary remedy which they seek. Much of plaintiffs'

motion consists of arguments that plaintiffs previously presented to the Court before and during the trial in this case. The Court rejected these arguments and plaintiffs have not shown that the Court's decision was clearly erroneous or that reconsideration is necessary to avoid manifest injustice. Further, to the extent that plaintiffs have raised new arguments, the Court finds that none of these arguments satisfies the standard outlined above such that the Court should reconsider its decision. Thus, plaintiffs' motion to alter or amend judgment is due to be denied.

Accordingly, it is now

ORDERED:

Plaintiffs' Motion To Alter or Amend Judgment (Doc. #71) is **DENIED.**

DONE AND ORDERED at Fort Myers, Florida, this 7th day of December, 2004.

/s/ John E. Steele
JOHN E. STEELE
UNITED STATES
DISTRICT JUDGE

Copies:
Hon. Douglas N. Frazier
Counsel of record

U.S. Constitution

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole

number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C.A. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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No. 08-432

Supreme Court, U.S.
FILED
DEC 2 - 2008
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In The
Supreme Court of the United States

BILLIE THOMPSON AND PATRICIA BROWN,

Petitioners,

vs.

GLADES COUNTY, FLORIDA BOARD OF COUNTY COMMISSIONERS; GLADES COUNTY, FLORIDA, SCHOOL BOARD; HOLLY WHIDDEN GREEN, GLADES COUNTY SUPERVISOR OF ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an influence district can satisfy the §2 requirement of The Voting Rights Act of 1965, i.e., whether influence district claims are viable under §2.

2. Are crossover votes properly considered in assessing a potential vote dilution remedy under Section 2 or the Fourteenth Amendment.

3. Whether the lower court erred in holding that Petitioners' proposed district failed to satisfy the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986).

PARTIES TO THE PROCEEDING

All parties in the Court of Appeals are listed in the caption.

Respondents accept Petitioners' statement of parties to the proceeding.

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SUMMARY OF THE ARGUMENT

Influence voting districts: The Supreme Court has deliberately declined to address the issue at bar and reiterated its declination.

Crossover voting: The Eleventh Circuit has deliberately declined to address the issue at bar and reiterated its declination.

The Panel Decision attempted to make a new rule of law contrary to judicial policy. The *En Banc* Eleventh Circuit declined to adopt the decision of the Panel.

THOMPSON and BROWN seek to have the Supreme Court impose the Panel Decision upon the Eleventh Circuit and the entire United States.

Constitutional proportionality: The "proposed voting district" will create Constitutional proportionality issues. E.g., it shall discriminate against a Hispanic minority which is larger than Plaintiffs' African American minority.

The present case is not a good vehicle to make new law. The population base of Hendry County is so small that even a change of a few individuals results in statistically skewed percentage figures.

Excellent District decision: The decision of the District Trial Court is exemplary and written with particularity and should stand.

REASONS FOR DENYING THE WRIT

Essentially, THOMPSON and BROWN challenge the Florida at large election system to elect DEFENDANT BOARDS arguing there is an unlawful dilution of African American voting strength. Pet. Br. 2.

The THOMPSON and BROWN propose an "illustrative district" to create an influence district for African Americans. They seek to have an influence district satisfy their §2 claims contrary to prevailing Supreme Court and Eleventh Circuit authority. Pet. Br. 6-7.

The first *Gingles* prong is dealt with by the District Court in its opinion particularizing the facts and the law supporting its opinion that:

> "The Court finds the proposed District 1 is in reality only an ***influence district***." Pet. Br. App. 41. [Emphasis supplied]

Then the District Court deals with the THOMPSON and BROWN argument that the proposed district is "close enough". Pet. Br. App. 41. The District Court specifically recognized that:

> The Eleventh Circuit recently held that an influence district **does not** satisfy the §2 requirement. *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260 (11th Cir. 2004). [Emphasis supplied] Pet. Br. App. 41-42.

The District Trial Court's **totality analysis** is set forth from Pet. Br. App. 47-54 in 11 subparts. In detailed findings the District Court reviewed and

analyzed all relevant legal factors to be considered in voter dilution cases.

E.g., the court found that African Americans are not currently significantly affected or hindered by racial discrimination; that there was no evidence of overt appeals to race or racially sensitive local election issues; that Glades County does not have any official anti-single shot policy; that there is no evidence of any voting practices or procedures proven to exist to have a discriminatory impact upon African Americans. Pet. Br. App. 48-50.

The THOMPSON and BROWN premise: Crossover votes may be used to satisfy the first *Gingles* requirement. This will be a new rule of law regarding an issue on which the Eleventh Circuit and the Supreme Court have recently and purposefully abstained. Pet. Br. App. 41, 85.

The Panel Decision attempted to create a new rule of law for the Eleventh Circuit by applying the crossover vote at the threshold *Thornburg v. Gingles*, 478 U.S. 30 (1986) stage. *En Banc* the Eleventh Circuit declined to accept that decision.

The Eleventh Circuit specifically declined to address this crossover issue in the *Dillard* decision that held a minority influence district impermissible as a §2 remedy. This Court stated:

> "**We leave open** the question of whether a §2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim, i.e., a claim where

> 'members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to elect representatives of their choice with support from a limited but reliable white crossover vote.'" *Dillard*, 376 F.3d at 1269. [Emphasis supplied]

The present case is not a good vehicle to make new law. The population base of Hendry County is so small that even a change of a few individuals results in statistically skewed percentage figures. Pet. Br. App. 41. The demographic numbers are stale and a new decennial census is due in 2010.

The decision of the District Court is exemplary. This Trial Court applied the applicable law to the facts of record, and weighed the evidence and credibility of witnesses. The decision of the Trial Court explained its findings and rationale with commendable particularity.

Additionally, THOMPSON and BROWN failed to raise white crossover voting at the trial as a basis for the sufficiency of their proposed remedial district. Accordingly, the record pertaining to such white crossover voting in the illustrative district is limited. Pet. Br. App. 95. The District Court did not err in declining to consider the white crossover vote in finding the proposed District 1 to be an influence district.

The Constitutional Claims:

With regard to the Fourteenth Amendment claim, the District Court found the record fails to show any inequality of opportunity results from the county's current electoral system. Pet. Br. App. 54.

With regard to the Fifteenth Amendment claim, the District Court found the Eleventh Circuit does not recognize a vote dilution claim under the Fifteenth Amendment citing *Osburn v. Cox*, 369 F.3d 1283, 1288 (11th Cir. 2004). Pet. Br. App. 14, 55.

One essential problem with acceptance of the THOMPSON and BROWN "illustrative district" plan is that they seek to have 10% of the population secure 20% of the seats on the SCHOOL BOARD and on the COUNTY COMMISSION. African Americans are not the largest minority in Glades County; Hispanics are the largest minority population. The trend of African American population is down. Pet. Br. App. 41, 90 at n. 4. The "close enough" rationale utilizing crossover votes does not treat the Constitutional issue of proportionality it creates.

The effect of the THOMPSON and BROWN proposed "illustrative district" shall establish a "safe seat" for a declining minority group to the disadvantage of a growing minority group.

Application of the new rules of law, proposed by THOMPSON and BROWN, to the facts of this case grant a windfall providing effective political power 75

percent above the declining minority group's numerical strength. Pet. Br. App. 102.

THOMPSON and BROWN's proposal is a denial of equal participation in the election process. The proposal does not deal with Constitutional proportionality requirements in current law. See *LULAC v. Perry*, 548 U.S. 399 (2006). The decision of the District Court did take into account the proportionality issues created by THOMPSON and BROWN's proposed "illustrative district" and is consistent with existing precedent which it cites. Pet. Br. App. 54.

CONCLUSION

The Opinion and Order of the District Court is excellent and right on the points raised at bar. This is ***not*** a case about facts. There are no material disputes over essential facts and the District Court's recitation of facts is exemplary.

THOMPSON and BROWN argue for an influence voting district to be judicially authorized for the first time despite prior declinations to do so by the Supreme Court and the Eleventh Circuit. The rationale of these courts is still valid and should be continued.

THOMPSON and BROWN argue that new law should be created to authorize consideration of crossover voting in §2 cases for the first time. The Supreme Court and the Eleventh Circuit have not done

so. The rationale of these courts is still valid and should be continued.

THOMPSON and BROWN argue that their proposed district is "close enough" even if it does not contain a realistic majority because it can be an influence district. This theory has been rejected and should not be accepted now.

This case ***is*** about an issue of law. The law on point is well settled and the Eleventh Circuit precedent settled the law in *Johnson v. DeSoto County Bd. Of Comm.*, 204 F.3d at 1344 and *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260 (11th Cir. 2004).

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 08-432

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IN THE
SUPREME COURT OF THE UNITED STATES

BILLIE THOMPSON AND PATRICIA BROWN,

Petitioners,

vs.

GLADES COUNTY, FLORIDA BOARD OF COUNTY COMMISSIONERS, GLADES COUNTY, FLORIDA, SCHOOL BOARD, HOLLY WHIDDEN GREEN, GLADES COUNTY SUPERVISOR OF ELECTIONS,

Respondents.

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CORPORATE DISCLOSURE STATEMENT

Petitioners are two individuals.

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ARGUMENT

1. Respondents contend that the creation of a remedial district for African American voters would "discriminate against a Hispanic minority which is larger than Plaintiffs' African American minority." Brief in Opposition ("BIO") at 1, 5. Because the claims here were brought by African Americans, not Hispanics, there is no record that Hispanic votes are diluted or that a districting remedy could be drawn if there were a successful claim brought by Hispanic voters. The only evidence regarding Hispanics is that they vote cohesively with African Americans so there is no basis to conclude that the remedy sought here would violate the rights of Hispanic voters. The premise of respondents' contention seems to be that a remedy for African Americans would preclude a remedy for Hispanics. That concern is entirely speculative. That a remedy might be justified for a claim brought by a different group cannot serve as a basis to deny a remedy for the racial group who proved their votes are being diluted.

At best, respondents' concern is premature. If plaintiffs ultimately prevail, then whether a plan is fashioned by defendants, *Wise v. Lipscomb*, 437 U.S. 535, 542-43(1978), adopted as a result of agreement between the parties, or fashioned by the court, the next step in the process is ordinarily to hear objections, based on the Constitution, statutes or other concerns, from any party or voters in the jurisdiction and to conduct a "fairness hearing." *E.g., Edge v. Sumter County School District*, 775 F.2d 1509, 1510 (11th Cir. 1985)(court must hold hearing to determine if plan it adopts complies with Section 2 of the Voting Rights Act); *Stovall v. City of Cocoa,*

Fla., 117 F.3d 1238, 1243-44 (11th Cir. 1997)(holding that the district court has the "discretion, if not indeed the duty" to conduct an evidentiary hearing to consider any objections to a consent decree plan that changed the method of electing a city council).

2. Respondents are incorrect in their assertion that African Americans are a declining minority group in Glades County. BIO at 5. As noted in the petition for a writ of certiorari, the African American voting age population percentage increased slightly between 1990 and 2000, from 9.65% to 10.12%. Pet. at 4 n.1 (citing Pl. Exh. 33, p. 2).

3. Respondents get the numbers right but their meaning wrong when they argue that the illustrative district disproportionately favors African Americans by giving them a fair opportunity to compete for elected office in 20% of the districts (one out of five) even though they only represent 10.12% of the county voting age population. BIO at 5. It is an argument that lacks all context. As matters now stand, whites have electoral control of all the seats on the county commission and school board (100%) even though they only represent 73% of the county voting age population. Contrary to respondents' claim, the appropriate proportionality review under Section 2 does not suggest that the violation here should go uncorrected in favor of the status quo. *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 436 (2006); *See Stabler v. Thurston County*, 129 F.3d 1015, 1022 (8th Cir. 1997)("Only in a rare case will the population ratios match the fractions of the number of districts such that one group is not over-represented. There is no reason

why the Native American minority in this case should continue to bear the burden of under-representation while the white majority enjoys over-representation.")

4. Respondents mischaracterize petitioners as "argu[ing] that their proposed district is 'close enough'" to 50% to be acceptable. BIO at 7. That was the district court's characterization, Pet. App. at 41, not petitioners'. Petitioners have contended throughout this litigation that their illustrative district, whether slightly over or under 50% in African American voting age population,[1] provides a realistic opportunity for African American voters to elect their candidates of choice. Respondents do not challenge that the district would be an effective remedy—indeed respondents characterize it here and below as a "safe seat." BIO at 5. This brings the issue under both Section 2 and the Fourteenth Amendment into sharp focus. Petitioners proved their votes are being diluted and that an effective remedy is available. No analytical tool—which is all a 50% rule is—should be applied to reject valid claims under either Section 2 or the Fourteenth Amendment.

5. Petitioners included as part of their claim that white crossover votes are properly considered if

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[1] As noted in the petition for writ of certiorari, the illustrative district has an African American voting age population of 50.23%. It is underpopulated from the ideal by 86 persons; the plan overall has a deviation of 8.6%. If 86 persons were added to the district, and all were age-eligible white citizens, the voting age population of the district would be no less than 47.58% African American and the White voting age population would be no more than 37.3%. Pet. at i & 7.

needed to make a remedy effective. They provided evidence of crossover voting through statistical analysis of election returns. The court below used the statistical evidence to find that petitioners had established the second and third *Gingles* prongs, and respondents did not challenge those findings on appeal.[2] Respondents' current argument that petitioners "failed to raise" crossover voting to support the remedy is incorrect. BIO at 4.[3] Petitioners expressly contended in the district court that they presented a claim under both Section 2 and the Fourteenth Amendment "whether or not they are an absolute majority in the illustrative district," and further described their claim as including "the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority." DE 41, p, 3 (Statement of Plaintiffs' Case in Pretrial Statement); DE 42, pp. 8-9 (Plaintiffs' Pretrial Brief).

In addition to being wrong, respondents' waiver argument is also irrelevant. Petitioners have been clear throughout this litigation that while white crossover votes may be considered, they are not needed to make the remedy effective because of the substantial presence of Hispanics (15.23%) and the reduction of the white voting age population to approximately 33% in the illustrative district. Indeed, there was never a factual dispute between the parties that the district would provide African

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[2] Pet. App. at 45-46; *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)(minority vote cohesion and majority bloc voting sufficient to defeat the candidates of choice of the minority).

[3] Respondents cite the dissenting opinion in the Court of Appeals for this statement. It is simply inaccurate.

American voters the potential to elect their candidates of choice. DE 41, p. 19 (joint pretrial statement of issues to be tried). Respondents are in fact correct in describing the district as a "safe" district for African American voters. The defense was a legal one, not a factual one: whether a majority-minority district is an absolute requirement regardless of the existence or size of crossover votes from whites. The opinion below not only applied a 50% requirement, but it held that a supermajority was required in order to provide a remedy. That holding merits review by this Court.

6. On the issue of the totality of circumstances analysis required under Section 2 and the Fourteenth Amendment, the opinion below was flawed in several respects. Petitioners seek, as they did in the court of appeals, a remand for consideration of the totality of circumstances. As previously noted, the court below did not reconcile its findings of intentional discrimination in the adoption of at-large elections for the school board and its finding of some evidence of racial intent in the adoption of at-large elections for the county commission election with its finding that there was "no evidence" of any "tenuous" voting procedures for either body. Pet. at 14; Pet. App. at 80.

Under Senate Factor 5,[4] the district court found that "African American citizens suffer in some ways from the effects of Florida's statutory history of purposeful discrimination," that African Americans in Glades County "suffer lingering socio-economic disadvantages from the past discrimination" which "hinder to some extent the ability of African American residents of Glades County to run for public office." Pet. App. at 50-51. But citing only petitioner Thompson's "respectable showing" in the 1998 primary, the district court concluded that the past discrimination "do[es] not severely impair equal footing in the political process, or significantly reduce participation in the political process." *Id.*

Related to that, the district court considered other African American candidacies under Senate Factor 7.[5] It found that the election of an African American to the county commission in 1976 and another to a city council within Glades County "undercuts plaintiffs' claims." Pet. App. at 52. The nine vote margin of victory of the 1976 candidate occurred when the county African American voting age population percentage was double what it is today, Pet. at 3, and the city council success was under a multi-vote election structure more favorable

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[4] Senate Factor 5: "The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." Quoted in *Gingles*, 478 U.S. at 37.

[5] Senate Factor 7: "The extent to which minority candidates have been elected to public office in the jurisdiction." *Id.*

to minorities. As the panel majority opinion of the court of appeals noted, the underlying facts of those two candidacies and the paucity of minority candidates in the history of the county (there were only three) supported rather than undercut the existence of vote dilution. Pet. App. at 81.

For these and other reasons, remand is appropriate to undertake the "searching practical evaluation of the past and present reality" required under Section 2. *Gingles*, 478 U.S. at 79.

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